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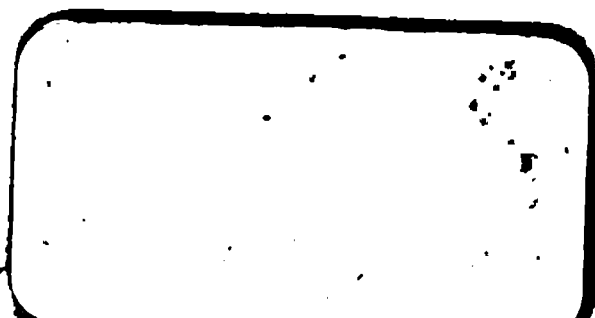
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ELEMENTS
OF
CONVEYANCING
IN
THEORY AND PRACTICE;
WITH
CURSORY REMARKS
UPON THE STUDY OF THAT SCIENCE;
AND
OBSERVATIONS AND DIRECTIONS
RELATIVE TO THE
PRACTICE OF CONVEYANCING.

THE SECOND EDITION,
CAREFULLY REVISED AND CORRECTED, WITH GREAT ADDITIONS AND
IMPROVEMENTS.

By CHARLES BARTON, Esq.
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. V.

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ELEMENTS
OF
CONVEYANCING.

BOOK IV.

PART I.

CHAP. I.

OF A DEVISE.

THE last mode of conveyance by which real property may be transferred from one person to another is by **DEVISE**, or "disposition contained in a man's last will and testament^a."

DEVISE.

In considering this species of conveyance, I shall inquire into,

- I. THE ORIGIN OF A DEVISE.**
- II. WHO MAY DEVISE LAND.**
- III. WHAT PERSON MAY TAKE BY DEVISE.**
- IV. WHAT PROPERTY MAY BE THE SUBJECT OF A DEVISE.**
- V. WHAT ESTATE OR INTEREST MAY BE DEVISED.**
- VI. WHAT ESTATE OR INTEREST MAY BE LIMITED OR CREATED BY DEVISE.**
- VII. OF THE FORMALITIES REQUIRED TO ATTEND A DEVISE.**
- VIII. THE MEANS BY WHICH A DEVISE MAY FAIL OF TAKING EFFECT; INCLUDING THE DOCTRINES OF REVOCATION AND REPUBLICATION OF DEVISES.**

^a 2 Blac. Com. 373.

DEVISE.

I. OF THE ORIGIN OF DEVISES.

SINCE by nature all were in a state of equality, independent on each other, they must have had the same right to all things necessary for the support of life; but when any one by his industry, acquired any thing out of the common stock, it thenceforth became his own; and no one could dispossess him of it, without manifold injustice^b. Hence we may infer, that every man had an absolute property in those things which he had acquired by his industry; but as all men could not easily provide themselves with every necessary for life, (for every place did not produce all things for clothing, food, &c.) men were wont either to seize upon what their neighbours possessed, or to exchange the productions of their several soils, as opportunity offered; but to prevent the tumults which arose from the former mode of transfer, it was judged most reasonable to establish the latter, by which men were allowed to transfer any share of their fruits or possessions, in lieu of any thing which they stood more in need of^c. Now the ways of transferring property must be either by alienation in the life of the possessor, or by testament after his death. The former privilege was acknowledged at a very early period, but the latter method of transferring property was not so easily allowed; and it has been disputed, whether testaments owe their original to the natural or a positive law. For since things, over which a right of property was first established, were intended only for the uses of men in this life, it was thought sufficient, to that end, to allow the occupier the command of his possessions during his life, without giving him the privilege of disposing of them after his death^d. But, on the other side, if we consider that men are under a legal as well as a moral obligation to provide for their children, as well as

^b Doct. and Stud. dial. 2,
c. 22.

^c Gilb. Dev. 2.
^d Ibid. 3.

DEVISE.

and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others : which, by a natural progression, first produced popular tumults and dissensions ; and these at length ended in tyranny, and the utter extinction of liberty ; which was quickly followed by a total subversion of their state and nation. On the other hand, it would seem hard, on account of some abuses, (which are the natural consequence of free agency, when coupled with human infirmity) to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety ; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property, which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times : but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

That the power of devising land existed among the Saxons^b in the fullest extent, appears by the will of Athelstan Atheling, son of king Ethelred¹, anno 1015 ; and that of Bythric^k ; and also by the will of Leofwine¹, dated 15th May 998 ; one testamentary clause of which is, “ Dedi etiam, &c. et meum patrum [quondam] *Leofwari* capitale domicilium in *Purlea*, et quicquid eidem pertinet ; et si *Eadwoldæ* filius diutius vixerit quam ipsa, ipsi cedat ; si illa diutius vixerit, et ita Deus volet, cedat exinde ei,

^b Bac. on Gov. 4to. edit. 108 ; Somn. 84, 89 ; Spelm. Treat. Feuds, 22 ; Wright's Ten. 172.

¹ Transcribed in Appendix to Somn. 119 ; *et vide* Saxon

Laws *et* Domesday Book.

^k Lamb. Peramb. 492 ; *et* Textus Roffensis, published by Hearne.

¹ Madd. Form. Ang. 421.

qui postillam præstantior sit de nostra cognatione," &c. But it appears from Glanville^m, that in this time a man *in extremis* could not by devise give away from his heir even a reasonable part of his land, (which he was allowed to give away by an act taking effect in his life-time); but if he made such a gift *in extremis*, the presumption of law was, that the party was not of sound discretion, and that his act was the consequence of insanity, not of cool deliberation. But a gift made *in ultima voluntate* was good, if assented to and confirmed by the next heir. But as tenants could not, by the feudal law, alien the tenancies without the licence and consent of their lord, when that system became part of the law of England, this power of disposing by will, (in whatever degree it before existed) as well as every other mode of aliening lands, was altogether incompatible with the existence of that tenure; therefore the power of disposing of real property, as well by will as otherwise, must have generally vanished immediately upon, or soon after that event.

Some exceptions, indeed, there were to this general restriction of alienation, which were founded either on the local customs of particular places, that were not subjected to military tenure, or on privileges retained by particular parts of the kingdom, with the consent of the first William. Of the former description were the cities of London, York and Oxford, and many other cities and boroughs; by the customs whereof the lands, tenements or hereditaments, lying or being within the same, might be disposed of by will; for this was a custom annexed to the land, and not to the personⁿ.

^m Glanv. lib. 7, c. 1, fol. 44; Plowd. 414, b; Dyer, 127, b; but see Bac. on Gov. c. 62, fol. 126; but in the Anglo Saxon times devisors sometimes are found to pray their lords that their wills may stand. See Maddox Form. Ang. Dissert. on Charters, 2, note E.
ⁿ Dr. and Stu. j. c. 7, 27; Fitz. Nat. Brev. 459, 463; Bro. tit. Dev. 43, 51; Ibid. tit. Customs, 41.

DEVISE.

Of the latter description, were lands, tenements or hereditaments holden in gavelkind.

But some doubts have been entertained whether this custom of devising was incident to that species of tenure, or whether it was a local custom of Kent, independent of and collateral thereto. This point was much litigated in the case of *Lauder and Brooks*, and it was at length agreed that this was a part of the custom of Kent^o.

Terms for years, and all chattel interests, also were not affected by this consequence of the introduction of feuds, they being, on account of their original insignificance, deemed personalty, and, as such, capable of disposition by will.

But although the feudal restraint on alienation could not but yield to the importunities of a people, who were constantly seizing upon every conjuncture that opened the least prospect of obtaining from the crown the re-establishment of their ancient and venerable laws, (the suspension of which, as to alienation, seems to have been of all others the most obnoxious intrusion), and the statute of *quia emptores terrarum*, by which the restraint on alienation was in a great degree removed, was procured; yet the restraint on devising continued for several centuries; the cause of which has been imputed partly to an apprehension, that the infirmity and consequent imposition to which a testator was exposed, rendered such devise suspicious; and partly to this species of conveyance not being attended with that general notoriety and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property, but which did not exist in the case of a devise^p. But

• *Lauder v. Brooks*, Cro. 225, 233; Salk. 237; Rob. Car. 561; S. C. 2 Sid. 154; Gavelk. 242.
Wiseman v. Cotton, 1 Sid. 111; 1 Rol. Abr. 608; 1 Blac. 77, 135; Hard. 325; Raym. Com. 374, 375; Wright's 59, 76; 1 Lev. 79; Fitzgib. Ten. 173; Gilb. Dev. 6.

whatever inconveniences might be incident to this mode of alienation to take effect after the death of the owner, it was soon found that there was no other way of rendering real property subservient to the casualties that arise in family affairs; for in direct successions *ab intestato* of real estates, the succession was governed by the political consequences of a positive system, which constituted the eldest son only heir¹. And among collaterals, not all the next of kin, but one was heir, to the exclusion of many in the same and many in a nearer degree. Simple contract creditors were not entitled to be paid their debts, and other hardships arose: but the devising power removed all these difficulties, by enabling a man to do justice to his family and creditors. During the suspension of this power, therefore, which continued from the reign of Hen. 2, to the latter end of that of Hen. 8, the necessity of family arrangement made the people ready to receive with avidity any contrivance to reinstate them in the possession of the valuable privilege of devising: and the ingenuity of ecclesiastics soon furnished them with the means by which they might substantially, though not directly, enjoy this privilege, under colour of a declaration of uses; an invention adopted by them from the civil law, to evade the statutes of mortmain; and which the clergy, who found men were most liberal to the church when they could enjoy their worldly possessions no longer, enforced as binding upon the conscience, and therefore solely cognizable in the court of Chancery where they generally sat. But at length this practice was checked, not accidentally, but designedly, by the statute of the 27th Hen. 8, which by transferring the possession or legal estate to the use, necessarily and compulsively consolidated them, and so had the effect of wholly destroying all distinction between them, till the means to evade this statute, and, by a very strained construction, to make its operation dependent on the intention

¹ *Per* Lord Mansfield, 1 Burr. 420.

DEVISE.

of parties, was invented. The consequence was, that lands generally once more became unalienable, unless by conveyance, to take effect in the life-time of the proprietor. However, the bent of the times inclined so strongly in favour of alienation, and the necessity of there being some mode by which men might render their property subservient to family purposes was so obvious, that the legislature found it necessary, within a few years, in the 31st of Hen. 8, to interpose in the regulation of this species of conveyance; and the crown was easily prevailed on to give its assent, by a statute made for that purpose, to the establishment of devises; especially as it was done in a manner that could be but of small detriment to the military tenures, which were then upon their decline in this country. The statute was afterwards explained by another, made in the 34th year of the same prince's reign. And it was afterwards found necessary, to add still further regulations to this mode of conveyance, by the statute of frauds and perjuries, passed, in the 29th year of the reign of Charles 2, all of which will be stated in a subsequent page.

II. WHAT PERSONS ARE CAPABLE OF DEVISING LANDS.

It may be observed, in general, that all persons who may convey lands by deed, may likewise devise them, if not disqualified by the express words of the statutes of wills, or by wanting the actual or supposed power of volition, from coverture, the being under the age of twenty-one, idiocy, non-sane memory, or duress^r.

34 & 35 Hen. 8,
c. 5, s. 14.

The 32 Hen. 8, c. 1, which for the sake of distinction is usually called the first statute of wills, makes no provision as to these disqualifications, but enacts generally, "that all and every person and persons having any lands, tenements, &c. shall have power to give, dispose, will and devise," leaving it to construction to determine who shall

^r Pow. Dev. 139.

be included in the description of "all and every person and persons." But upon the construction of statutes, the mere letter is not to be considered, but the internal meaning and sense of the legislature; for oftentimes cases within the letter of a statute are not within the sense, the sense being sometimes more confined and contracted than the letter, and sometimes more large and extensive. The extending or diminishing the operation of the words of a statute is called, in law, construing it according to the equity of the statute, which equity implies the enlarging or diminishing the letter according to legal discretion, so as to embrace all the purposes which the statute had in view to attain. And, therefore, where the letter of the statute of the 32d Hen. 8, empowers "all and every person, &c. to will and devise," the equity of the law corrects these general words, and restrains them to comprehend only such persons, as by the rules of the common or statute law could, previous thereto, alienate lands by other kinds of conveyances; and, as before the statute of uses, no person, unless under particular local customs, was suffered to pass the use by will, who could not by legal conveyance pass the land itself, so, after the statute of wills, no person was held to be empowered to pass lands by will to take effect after his death, who could not pass the lands by other conveyance during his life. Although, therefore, the 32d Hen. 8, gave power to every person having land to devise it, and made no exception, nor created any particular qualification, yet the law operated on those general words and restrained them, saying, no person disabled by the common law to dispose of their property by other conveyance should devise it; hence, in expounding that statute, a woman covert, person under twenty-one, idiot, or person of non-sane memory, was considered as not comprehended under these general words'. To remove all doubts upon this head, however, it was expressly enacted

' Dyer, 354, b; 1 Ves. 300.

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by the explanatory statute of 34 Hen. 8, c. 5, s. 14, "that wills or testaments made of any manors, lands, tenements or hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person of non-sane memory, shall not be taken to be good or effectual in law."

Infancy.

The disqualification arising from being under the age of twenty-one, is founded on a presumed want of discretion in persons in the early stage of life to dispose of their property: the law, therefore, in compassion to the weakness of their judgment, has utterly disabled them from conveying and transferring their inheritance or freehold, until the judgment has arrived at maturity: and, as the law cannot weigh with precision the particular ability and judgment of each individual, and it would be inconvenient and dangerous to entrust any court to determine upon personal discretion at different ages, as different persons might entertain a variety of opinions of an infant's ability and judgment, it has wisely laid it down, as a fact to be presumed and not to be denied, that all men under the age of twenty-one shall, in common, lie under this imputation of want of discretion; and, therefore, in the execution of all instruments, the right to convey real property, whether it originates by common law, general custom, or statute, implies, *prima facie*, that the persons conveying are of full age, and, unless they are so, the instrument will not be valid.

But, if there be a local custom, that all lands and tenements within such a precinct, &c. shall be devisable by all persons who shall be of the age of fifteen years, or above such age, a devise made of lands or tenements by one of such age is good¹ (1). And in reckoning the age of an

¹ Perk. 221; M. 37 H. 6, 5.

(1) And it should seem that, in pleading a will by an infant, a certain age must be set down, that the court may judge it an age of discretion; and it must not be left upon telling

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infant, the day of his birth shall be reckoned exclusive: thus if he were born the 15th of February 1608, this month twenty-one years after he will be of full age, the 14th of February^a.

The disqualification of idiocy is founded on the actual incapacity of the person, and is a common law disability^a. Idiocy. An idiot, or natural fool, is one that hath no understanding from his nativity, and therefore is by law presumed never likely to attain any^b: for which reason the custody of him and of his lands was formerly vested in the lord of the fee^c; and still, by special custom in some manors, the lord shall have the managing of idiot and lunatic copyholders; but the 17th Edw. 2, c. 9, directs (in affirmance of the common law) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and, after the death of such idiots, he shall render the estate to the heirs, in order to prevent such idiots from aliening their lands, and their heirs from being disinherited^d. But a man is not an idiot, if he hath any glimmering of reason, so that he can tell his parents, his age, or number twenty pence, or the like common matters^e. A man who is born deaf, dumb and blind, is, however, looked upon by the law as in the same state with an idiot, he being supposed incapable of any understanding, as wanting those senses which furnish the human mind with ideas^f.

The third natural disqualification is that of being of non-sane memory, and is likewise founded on the actual

^a *Herbert v. Torball*, 1 Sid. 142; S. C. Raym. 84.

^a 4 Rep. 126.

^b F. N. B. 233.

^c Dyer, 143, b. 203, b.

^c Co. Lit. 42; Flet. 1. 6,

^d Flet. 1. 1, c. 11, s. 10.

c. 40.

^e Dyer, 302.

telling twelve pence, or measuring a yard of cloth; for, custom cannot abrogate the law of nature. Hob. 225; Rob. Gavelk. 224; 39 Edw. 3, 2, b; 13 Edw. 3; Fitz. Dum. fuit inf. ætat. 3; 19 Edw. 2; Godb. 14.

DEVISE.

incapacity of the person devising to do any act relating to the disposition of his property, and consequently is a common law disability^d. It is therefore necessary that every one must be of good and sane memory at the time of disposing of his property. And it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory which the law calls a sane and perfect memory^e. And what shall be said to be a sane and perfect memory at the time of devising of land, is a question to be determined at common law^f.

Coverture.

The fourth disqualification, expressly enacted by the statute of 34 Hen. 8, is coverture, which, as has been said, is a civil disqualification at common law, arising from want of power, or free agency^g; for the law, having put a wife under the obedience of her husband, and submitted her will to his, presumes, (and admits no evidence to the contrary,) all acts, done by her during coverture, to be done by the constraint of her husband, and to be his acts and not hers; and, consequently, infers that she wants free-will as the others want judgment^h. And therefore it has been holden, that a feme covert cannot devise to her husband; for that would be the act of the husband to convey the land to himselfⁱ. So, in 29 Edw. 3, where a woman, seised of lands devisable, took a husband, and had issue, and devised lands to the husband for his life, and died, and a

^d Cro. Jac. 497; Dyer, 148, b.

^e *Marquis of Winchester's* case, 6 Co. 23; Dyer, 72, a, in margin, *per Coke*; 1 Ch. Rep. 13; *Combes's* case, Moore, 760.

^f 6 Co. 23, b.

^g 4 Co. 61, b; Hob. 225; Co. Lit. 112, b.

^h Dy. 354, pl. 34; Swinb. 88.

ⁱ 3 Edw. 3, tit. Dev. Bro. 43, so cited Godb. 15; but 4 Co. Rep. 61, cites same case, 3 Edw. 3, Dev. 12; but see Bro. Dev. 34, which is the case referred to; and S.P. Bro. Dev. 33, and 31 Ass. 3.

writ of waste was brought against him as tenant by the courtesy, it was holden that it did lie, and that he was not in by the devise^k. And a custom set up that *qualibet fœmina viro co-operta* might devise land, whereof she was seised in fee according to the custom of the manor, to her husband, and surrender it in the presence of the reeve and six other persons; was disallowed, the court being of opinion that the custom was unreasonable, because it could not have a lawful commencement^l; for it should be intended that the wife, being *sub potestate viri*, did it by the coercion of her husband. That the same law was of a custom, that the wife might lease to her husband.

But, if the husband be banished for his life by act of parliament, the wife may make a will^m. For the husband being by act of parliament banished for life, the wife may in all things act as a feme sole, and as if her husband be dead, the necessity of the case requiring that she should have such power.

And now, since the authority of courts of equity has been fully established, and the doctrines of powers and trusts extended to answer those purposes of family arrangement which could not be obtained whilst the strictness of common law conveyances prevailed, modes have been adopted by which femes covert may, by agreement, retain or procure in that situation the same powers over their own estates, real as well as personal, as they possess whilst sole. And if such agreement be made before marriage, it may be done without a fine or recovery; but if after marriage, there must be a fine levied, or recovery suffered; because the property of a feme covert, pending

^k Cited Godb. 15; *et vid.* Fitz. Abr. tit. Dev. 15; Bro. tit. Test. 13; S. C. Lib. Ass. 31, 185, a. 3.

^l *Skepwith's case*, Godb. 14, pl. 22; *Ibid.* 143, pl. 178; *sed vid.* 3 Com. Dig.

14, tit. Dev. Hen. 3, *et note*, said there, that femes covert may devise by custom of London; but it seems to apply to chattels only.

^m *Countess of Portland v. Proddger*, 2 Vern. 104.

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the coverture, cannot be affected by any act of herself or her husband, unless through the medium of those species of common assurance.

There are two modes of settlement equally apt for this purpose; viz. either by way of trust, or by way of power over an use^a. First, by way of trust, as if a woman having a real estate, by a proper conveyance, convey the same, either before or after her marriage, to trustees, in trust for herself during her coverture for her separate use, and, afterwards, that it shall be in trust for such person as she shall, by any writing under her hand and seal, or writing in nature of a will, appoint, and in default of appointment, for her heirs; and then marry, and make such appointment accordingly: this will be a good declaration of the trust, and a court of equity will support it; and no conveyance can be made to the heir at law contrary to this direction to the trustees.

Secondly, by way of power over an use (which is the most usual mode of making such settlement). As if a woman convey an estate to the use of herself for life, remainder to the use of such persons as she by writing, &c. shall appoint, and in default of appointment, to her own right heirs; the execution of such power reserved to her will be supported in equity.

And, in the case of *Southby v. Stonehouse*, Lord Hardwicke was clearly of opinion, that such writing, in nature of a will, made by a feme covert by virtue of a power reserved to her in a settlement, was good^o. And his Lordship, in delivering his opinion, observed, that these appointments through the medium of powers being mere modifications of uses, originally fell under the jurisdiction of courts of equity only; for before the statutes relating to uses, courts of law could neither judge of the consideration upon which uses arose, nor of any conveyance of

^a 2 Ves. 191.

^o *Southby v. Stonehouse*,
2 Ves. 612.

uses. But the several statutes respecting uses, and, particularly that of the 27th Hen. 8, by transferring uses into possession, incorporated the estate and the use together; in consequence of which uses, and consequently powers, which are modifications of them, become legal estates, and may be judged of in courts of law. When these powers were first brought under the jurisdiction of the common law, by the statute 27 Hen. 8, they were taken too strictly in point of circumstances, and being considered as in some degree analogous to authorities over the legal estate, the formation and execution of them were in consequence rigidly investigated. But of late the courts of law have considered them in a more favourable light than heretofore, and viewed them more properly as part of the old dominion which the owner of the estate reserves to himself upon the creation of the estate for life, or other estate to which they are annexed; which construction seems most consonant to natural reason and the intention of the parties. The courts, therefore, now so modify them as to indulge persons in any reasonable limitations or dispositions of their own property, so long as those limitations have not for their object the tying it up for a longer period of time than the policy of the common law permits. Now it has been before observed, that every power, when executed, takes its effect by virtue of that execution of the power, as if the limitation in the instrument of appointment had been contained in the deed creating the power; and, consequently, if the author of the power has an estate, at the time of creating the power, out of which he can then carve such an estate, as the power has for its object, the creation of that estate will spring up when it is executed; as the power will then operate, as to its effect, on the estate out of which the limitation is to arise, as if it had been limited when the power was created. Now, if the creator of a power, at the time of making the settlement in which it originated, were a feme sole, there can be no doubt but that she might then exercise any act

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of ownership upon that property, or make any contract relating to it; she might dispose of it to whom or in what manner she pleased; why, then, when a feme sole, contracting as to the disposition of her property, instead of immediately limiting it to a particular person, limits to a person or persons to be afterwards appointed, the disposition of the property is considered as taking place then, though the nomination of the appointee of it is not made until the execution of the power by the actual appointment; so that the deed of settlement, and not the deed of appointment, is considered in equity as the deed of alienation^p: and when a feme sole contracts, that the person to take by her settlement made *in præsenti* shall be nominated by a deed in writing, or by a will, or other instrument in nature of a will, &c. to be executed *in futuro*, the latter instrument does not take effect in equity as a deed or instrument of alienation made by her under the character of a feme sole, but merely as an appointment of the person to take pursuant to the mode prescribed in the original contract. And that this is the true construction of these instruments, executing powers, seems evident from this circumstance, that a settlement made before marriage of a woman's real property upon herself as if she were a feme sole, will not enable her to do any act for alienation of it without a fine^q.

So if the disposition of the property of a feme sole be, on her marriage, left to rest on an agreement by which she, in consideration of that marriage, agrees with her husband that she may, by writing under her hand executed in presence of witnesses, or by will, dispose of her real estate, without any thing being done to alter the nature of the estate; such agreement will not enable her to dispose of it^r: for although, as to personal estate, there is no doubt but that, when there is an agreement between

^p 1 Inst. 111, 112.

^r 2 Ves. 191.

^q *Peacock v. Monck*, 2 Ves. 191.

husband and wife, before marriage, that the wife shall have to her separate use either the whole or particular parts thereof, she may dispose of it by act in her life, or by will, and that though nothing be said of the manner of disposing of it; the reason of which is, because that it is an agreement to take effect during the life of the husband; for, if the husband survives, he is entitled to the whole, and none can come in on the statute of distributions for a share of her personal property with the husband; then such an agreement binds and bars the husband, and, consequently, bars every body; yet the case is different as to real estate, for the real estate of the wife will descend to her heir at law, and that more or less beneficially: for the husband may, if they have issue, be tenant by the courtesy, otherwise not; but in all events it will descend to her heir at law. Such stipulation then resting in agreement, if made, though it may bind her husband from being tenant by the courtesy, which arises from his own agreement, cannot effect the right of a third person, the heir at law. Still she is a feme under the disability of coverture at the time of the act done, and if she attempt to make a deed or will, the instrument will be invalid; for, in such case, it must enure as a deed or a will, neither of which the law will permit her to make. But it may be questionable, whether such an agreement between husband and wife would not give her a right to come into a court of equity, after the marriage, to compel her husband to carry it into execution, and to join with her in a fine to settle the estate either on such trusts, or to such uses, as would give effect to the agreement. And if it were such an agreement as a court of equity would decree to be carried into execution by a further conveyance, then the question would be, whether her heir at law would not be bound by the consequences of that agreement? But that is the only way by which it could be effected. But if the agreement could not be carried into execution, though

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she might have power to bar her husband, (his being a voluntary claim from her) yet, as the law vests the descent in the heir, the better opinion seems to be, that such a deed or will would not affect him.

But, although an instrument in nature of a will, executed by a feme covert, under a power, by deed or will, to declare and limit her real property to such persons and for such estate therein as she shall direct, does not take effect strictly and properly as a will, taking its inception as an independent act of the mind at the time of its execution, but, as an appointment or dependent act, referring back to the settlement out of which it issues and by which it is created, and deriving from that all its operative faculty; yet in all other respects, viz. as to the external form, and its action upon the estate settled, it partakes in all respects of the nature of the instrument to which, by the terms of the settlement, it is to be analogous; therefore the same disqualifications that create a non-ability to devise in other cases, extend also to this case. Thus, where *W.* by his will devised all his real estate to trustees, in trust for the sole and proper use of his daughter *M.* during her life, and to be at her disposal, and not to be subject to the debts or control of her husband; and to permit her, by deed or writing, executed in presence of three or more witnesses, notwithstanding her coverture, to give and dispose thereof as she should think fit. *M.* being under the age of twenty-one, but above seventeen, living separate from her husband, made her will, and, in pursuance of the power given by her father's will, disposed of her real and personal estate in manner therein mentioned. And on a question, whether this devise by *M.* was a good execution of the power under the will of *W.*, *M.* being then under twenty-one years of age, Lord Harwicke said, that this was a very considerable question, and

Hearle v. Greenbanke, 3 Atk. 897; 2 Ves. 298.

never determined that he knew of. He could find no case where a power, given generally, could be executed by an infant, and therefore he would make none. This was a power coupled with an interest, which was always considered different from a naked power. This execution was to operate on the estate of the infant, for she had the trust in equity for life, with the trust of the inheritance in her in the mean time, which would remain in herself, if not disposed of, and descend to her daughter; so that this was directly a power over her own inheritance, which could not be executed by an infant.

The next disqualification that occurs is a civil disqualification at common law; viz. the deviser's being under restraint, duress or menace of imprisonment¹. This, though not expressly provided against in the statute, seems necessarily to be implied, from the words in the statute of 34 Hen. 8, "at his free will and pleasure." And it was therefore held by Roll, Chief Justice, in a trial at the bar, that if a man make his will in his sickness by the over importuning of his wife, to the end that he may be quiet, this should be said to be a will made by restraint, and should not be a good will². But there must be actual proof of some undue importunement of, or restraint upon, the devisor, or the law will not avoid a will regularly made. Thus, where *B.* had made a will, and gave his lands to the children of his daughter in tail; and afterwards he made another will, by which he gave one part of his estate to *W.* and another part to a remote kinsman; although it appeared that this latter will was obtained by great circumvention; "for that *W.* got into the devisor's acquaintance, who was at that time very infirm, by pretences of some little offices of friendship and kindness, and got him away from his friends and relations, and during his sickness, by false stories drew his affections

Duress.

¹ Dyer, 143, b; Raym. 334. *Maunday*, 1 Ch. Rep. 66;

² *Hackerv. Newborn*, Style, *sed quæ. et vide* Com. Dig. 427; and see *Maunday v.* vol. 3, tit. Dev. H. 1.

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from his daughter, and kept him in secret places that no friend might come at him; and that this will was made while he was so secreted and wrought upon, whereby he gave his estate away from his child to a stranger²." And the judges unanimously declared, that this will was obtained by fraud and practice, and that there was great reason, if they could, to relieve against it; yet that, on search for precedents, none could be found that would come up to the case, there being too positive proof of actual interposition (1).

If either of the last-mentioned disabilities, viz. infancy, non-sane memory, idiocy, coverture or duress exist at the inception of a will, it will be absolutely void, although the disability be actually removed before the consummation of the will by the death of the devivor; for a devise or will is an act of the mind at the time of the making, and, therefore, the parties must be qualified and have ability then¹. Thus in *Herbert v. Torbal*, at bar, it was agreed by the court, that if one under the age of twenty-one made a will and devised his lands, and died after twenty-one, this would be a void devise². So though a man at full age declared, in the presence of several witnesses, that his will, made when he was under age, should stand; it was held, by Holloway and Allibon, that the will was void, by reason of the infancy at the time of the first publication³. So if a feme covert make her will and give lands devisable by the common law, and afterwards her husband

¹ *Roberts v. Wynn*, 1 Rep. Ch. 125, cited 3 Ch. Ca. 103.

² Dy. 143, b; Anderson's Rep. 182; Ca. T. Holt, 246; Ibid. 747; 11 Mod. 157; 2 Eq. Ca. Abr. 357.

³ *Herbert v. Torbal*, or *Tuckal*, 1 Sid. 162; S. C. Raym. 84; S. C. 1 Eq. Ca. Abr. 172, pl. 4.

⁴ *Hawe v. Burton*, Comb. 84.

(1) But the parties complaining to parliament, were relieved by an act for that purpose. 3 Ch. Ca. 103.

die, and then she die, the devise will be void; because the consummation is founded on the first part, viz. the making and publishing, which are void; and therefore, although at the time of her death, she is discovert, yet her death cannot give effect to the will unless the commencement be good^b. So if a man be of non-sane memory at the time of making his will, though he afterwards, long before his death, become a man of understanding and sound judgment and memory; yet the will made during his insanity will be void, and cannot by any means be made valid^c.

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III. WHO MAY TAKE BY DEVISE; AND BY WHAT DESCRIPTION.

THE custom of devising before the statute of wills being annexed to the land and not to the person of the devisee, it followed, that, if lands were devisable, the owner might have disposed of them *ad libitum*, and that even in mortmain as well as otherwise. But the power of devising given by the statute of the 32d Hen. 8, as explained by the 35th Hen. 8, was restrained to persons not being bodies politic or corporate, which excluded devises in mortmain; and although the 43d of Eliz. c. 4, was construed to authorize a devise to a corporation for a charitable use, as operating in nature of an appointment rather than of a devise; yet the 9th Geo. 2, c. 36, checked this practice by prohibiting such dispositions, as tending to defeat the political ends of the statutes of mortmain. Persons now, therefore, in order to their taking by devise, must be such natural or civil persons as are not expressly or by inference excepted out of these statutes, but all others may be devisees.

^b Plowd. 343; S. C. 1 Eq. Ca. Abr. 171, pl. 3; 1 Salk. 238; Rep. temp. Holt, 240, 244, 747; 11 Mod. 123. ^c *Arthur v. Bokinham*, 11 Mod. 157; S. C. 2 Eq. Ca. Abr. 357, pl. 5.

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Coverture, therefore, creates no disability in a woman to take as a devisee; and although at law, if her husband disagree, it will avoid the devise; yet equity would interpose in such case, and prevent a husband from prejudicing his wife, by dissenting to her taking a benefit under a devise^d.

Nor is a wife disqualified by her coverture from being a devisee to her husband, either under the custom or the statute; for the reason that she cannot be a grantee under a grant from her husband, is, because the husband and wife are considered as one person in law, a principle which does not apply in case of a devise: because the husband has the estate radically in him, and the devise does not take effect until after his death, and then they are no more one person^e.

Aliens.

So an alien, it should seem, may take by devise, for an alien may take; and the only consideration will be, for whose benefit, *i. e.* whether for the benefit of the crown or himself^f. And in this respect, there appears to be no ground for distinguishing between the case of a devise or of any other conveyance; for when an alien takes by will, the estate, on the will's being consummate, vests in him, and he is in to all intents and purposes as any other devisee would have been, until something further be done to take the devised estate out of him again; for, as long as the alien lives, the inheritance is not vested in the king, nor shall he have the land, until office found: and therefore, before office found, a recovery by an alien tenant in tail will bar the remainders, he being tenant of the land: but, if he die before office found, the law casts the freehold and

^d See Perkins, s. 43, 44; but note, Perkins relates only to a conveyance made to a wife: the principle, however, applies.

^e 1 Eq. Ca. Abr. 173, pl. 9; Fitzh. Dev. 285, pl. 13; Co.

Lit. 112, b; 1 Rol. Abr. 610; Bro. tit. Dev. 18, 34; Ca. T. Holt, 241; 44 Ass. 36.

^f *Knight v. Du Plessis*, 2 Ves. 360; and see *Godfrey v. Dixon*, Godb. 275; *Noy*, 137.

inheritance upon the king for want of heirs, an alien having none. So that the title of the crown is collateral to the title by the devise, and has no retrospect to the time of its being consummate; nor does it affect the land in the hands of the devisee until another distinct thing is done to entitle the king, not under the devise, but by right of his prerogative, viz. office found; the tenant being an alien, and consequently, though of capacity to take lands in his own right, yet not of capacity to hold them^a.

And since the statute of the 18th Geo. 3, c. 60, which Papist. repeals so much of the statute of the 11th & 12th Will. 3, as disables persons educated in the popish religion, or professing the same, under the circumstances therein mentioned, to inherit or take by descent, devise or limitation, in possession, reversion or remainder, within the kingdom of England, &c. provided such persons, within the time limited by the act of the 18th Geo. 3, take the oath thereby prescribed; papists complying with that oath are likewise capable of being devisees of real property.

A bastard cannot be a devisee until he have gained a name by reputation^b. But having gained a name by reputation, he may take by such description^c. Bastard.

A person may take as a devisee, not only where he is described in certain; as where a devise is to A. or B. or the like, accompanied with proper circumstances of identification; but also by any circumlocutious description, that is sufficient to identify the person intended to take, for wills are always liberally construed. Thus, where a man by will devised his lands to one of his cousin's daughters, that should marry with a Norton within fifteen years. A. had three daughters, E. A. and M; E. married to a Norton, and on a question, whether she or the heirs at law should have the land, one objection taken by the heir at law was, that the devise was void for uncertainty as to

^a Gouldsh. 102; 4 Leon. Dyer, 313; Noy, 35.

^b 84; 9 Co. 141.

^c See Co. Lit. 3, b. n. (1); Leon. 48, 49.

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the person, for two might marry with a Norton. But the court agreed that the devise was good, notwithstanding the uncertainty; for that, although the words were not, who should first marry with a Norton, yet the law would supply these words in a deed, where, if two constructions were made, and one made the grant void and the other not, the latter should stand; *à fortiori* in this case; and therefore it should not be presumed that more than one would marry a Norton, especially as the words of the will fixed in a single person; and they said there was a difference when there was uncertainty in the event and uncertainty in the person^k. So a devise may be to *R.* or *B.* which shall have issue first; or to the first son of *A.* that shall have issue^l.

Persons not in
esse.

Persons not *in esse* may likewise take by devise. But a distinction seems to have been formerly taken between a *present* devise to them, and a devise to them by way of *remainder*; for if there was a tenant for life in *rerum natura* at the time of the devise, but no person in remainder in *rerum natura*, yet the devise was good if he in remainder were *in esse* at the time when the remainder fell in^m. Thus where there was a devise by a man to his wife for life, and, after her death, to *I.* a son of the testator, and to his heirs male of his body engendered, and for default of such issue to the next heir male of the devisor and the heirs male of his body; it was held that the devise to the next heir male of the devisor would have been good on the demise of the wife and *I.* without issue, if an heir male had been born previous to those eventsⁿ (1).

^k *Bate v. Norton*, T. Raym. 275; 1 Eq. Ca. Abr. 173, 82. pl. 14.

^l Lit. Rep. 256.

^m *Per* Babington, 9 Hen. 6, 12, 13.

23; Bro. Dev. 5; 2 Bulst.

(1) But no heir male having been born until after those events had happened, that limitation was held to have failed, and the estate to have vested irremovably in the heir at law of the devisor.

So where *W.* seised of a copyhold of inheritance, surrendered it to the use of his will, and, having a son born, and another *in ventre sa mere*, devised part of his land to his son or daughter with whom his wife was *enseint et hæredibus suis legitime procreatis*, and the residue to his son born, to him and his heirs of his body, and, if he died without heirs of his body, the lands to remain to his child *in ventre sa mere*; and if both died without heirs, then over; the devisor died, and then the wife had a daughter; and on a question, Whether the daughter *in ventre sa mere* could take by purchase a real estate, as a copyhold was, it was held by all the justices that she might take an estate in remainder^o (1).

On devises made to persons not *in esse*, a distinction seems likewise to have been formerly urged between the appointment of such devisee *per verba de præsentî*, or *per verba de futuro*^p: and although it be now clear, that a person not *in esse* may be a devisee *per verba de futuro*; yet it is not settled whether he may *per verba de præsentî*^q. Thus, in the case of *Snow v. Cutler*, the court, consisting of Wyndham, Moreton, Twisden and Keeling, expressed themselves clearly of opinion, that a devise to an infant when it should be born would be good, and the land would descend to the heir in the mean time^r. So where *W.* devised messuages in London to his wife for life, and, after her decease, to such child as she was then supposed to be *enseint* of, and

^o *Church v. Wyat*, Moore, 637; *et vide* 2 Bulst. 273, 275, 276. ^q 2 Bulst. 275; Mich. 12 Jac.; S. C. 1 Rol. Rep. 109. ^r *Snow v. Cutler*, 1 Sid. 153; 1 Lev. 135; Salk. 229; Godb. 386. ^p 1 Eq. Ca. Abr. 173, pl. 12.

(1) It is proper to observe here, that it is stated in the last case, that the wife of the devisor entered and was admitted; from which circumstance, and from the judgment of the court, it seems reasonable to presume, that there was an estate for life limited to the wife previous to the estates to the children in tail.

DEVISE.

to the heirs of such child for ever; it was said by Lee, Chief Justice, who delivered the opinion of the court, that, though formerly it had been doubted whether a devise to an infant *in ventre sa mere* was good, yet it was then clear, that where it was *per verba de futuro*, it would take effect^a.

And with regard to a devisee constituted *per verba de presenti*, a further distinction has also been attempted between devises by custom and devises by statute; and it has been said that, although such a devise was beyond all question, good at common law, yet that doubt might arise on the statute of Hen. 8, which enacts, that it shall be lawful for a man, &c. to devise his lands to any person or persons; because in such case the devisee, not being in *rerum natura*, in strictness of speech is no person; and therefore that under those statutes such devises were void^c. But this distinction will be found not to be warranted by any sufficient authorities^d. And in the case of *Snow v. Cutler*, Twisden, Justice, and Keeling, Chief Justice, held, that a devise to an infant *in ventre sa mere* was good, and was tantamount to a devise to an infant *in ventre*, &c. when it should be born^e; and they said that Hale, Chief Baron, was of that opinion, and had told them, that he had caused the roll of the case stated by Dyer^f to the contrary, to be searched, and that it did not warrant the opinion reported; and so said Hyde, Chief Justice, when this case was argued; viz. that he had viewed the roll, and was of opinion with Hale. And the late Mr. Fearne, whose opinion, upon any abstruse point of law is deservedly in the highest reputation, entertained no doubt, "that a devise to an infant *in ventre sa mere* necessarily implied a future disposition to take effect at its birth, as much as if the

^a *Andrews v. Fulham*, Stra. 1099.

^b 2 Mod. Rep. 9.

^c See Pow. Dev. 323, and cases there cited.

^d *Snow v. Cutler*, Lev. 135, 156; S. C. 1 Sid. 153; 1 Keb. 567, 752, 800, 801, 802, & 851; 2 Keb. 11, 145, 298.

^e 303, b. pl. 49.

^f 303, b. pl. 49.

words, when he shall be born, were added; for surely (says he) it cannot be imagined that the child should take the estate before it was born^a."

This difference of opinion, as to such a devisee constituted *per verba de presenti*, and *per verba de futuro*, seems to have sprung from the strictness with which Judges in early times regarded executory devises, which were suffered to exist in no cases, unless supported by the manifest intention of the testator; and the intention to create a future devise in favour of a devisee not *in esse*, was considered in those times as not sufficiently evinced by the mere fact of the testator's devising to an infant *in ventre sa mere per verba de presenti*; it not being then considered, that the devise being in its nature not capable of taking effect *in presenti*, was a ground from whence it must necessarily be inferred, that it was intended to take effect *in futuro*^a. As it was by no means unfair to contend that a devisor, when using those words, might not advert to their precise operation, or be aware of the distinction between an estate to commence *in futuro*, which could only take effect by way of executory devise, and a present estate^b; it seems therefore to have been then held necessary that, in order to pass an estate by executory devise, there must have been an apparent express intent arising out of the words of the will, which the principal case was held not to furnish evidence of, their natural import being that a present estate was to pass^c. Thus, a devise to the heirs of *J. S.* where *J. S.* is living, is void, because it shall not take place as an executory devise, there being no ground to argue that the

^a Fearne on Contin. Rem. 428; and see Pow. Dev. 328, where the cases upon the subject are collected and distinguished.

^b See Dyer, 274, b, pl. 42, cites 18 Edw. 3. A devise to a man to hold to him and

to his first son to be begotten, not good, either by way of joint-tenancy or remainder.

^c 2 Keb. 297.

^d Per Cur. 2 Salk. 226, 229.

DEVISE.

testator meant a future devise from the mere circumstance of his knowledge that *J. S.* is living, and the words carrying a present devise, it fails, because *J. S.* being living can have no heir. So on a devise to the issues of *J. S.* such only as are living at the time of the gift shall take^d. And, the like law is of a devise to *A.*'s first son^e, he having none; for it does not import notice in the testator of that fact^f. But, *per* Powell, Justice, though a devise to *A.*'s first son, does not import that *A.* has none, yet, a devise to one *in ventre*, &c. by the taking notice that the devisee is *in ventre*, shews the testator intends a future devise: and Treby agreed in that opinion.

But, whatever may be the construction put upon the claim of a mere devise *in ventre sa mere*, whenever the case shall again occur, the law is now fully settled, that in all cases where there are any *express words* used, or facts adverted to by a testator, intending exercising his bounty towards an infant *in ventre sa mere*, from whence an inference can be drawn, that he was aware the devisee could not take immediately, the devise will take place upon the infant's coming into *esse*.

Thus, if a devise be to an infant *in ventre sa mere*, when he shall be born^g, or the devise be, that if the child with which the mother is *enseint* shall be born, it shall have a share with the rest of the testator's children; the child shall take, though not *in esse*, at the death of the testator^h. So a devise to the heirs of the body of *J. S.* notice being taken by the devisor that *J. S.* had no heirs at the time, was held a good devise to after-born issueⁱ. So a devise to the heirs of *J. S.* after the death of *J. S.* will be good by way of executory devise^k: and it would be the same

^d 2 Keb. 297.

^e Ibid. 291.

^f *Per* Powell, 2 Salk. 229.

^g 1 Lev. 135, *per* all the justices; 1 Eq. Ca. Abr. 173, pl. 12.

^h *Woolley v. Nightingall*,

cited 2 Keb. 300; *Fermer v. Fassett*, C. B. 1655, cited

1 Keb. 752.

ⁱ *Bate v. Amherst*, 15 Car.

2.

^k *Per Cur.* 2 Salk. 229,

230.

of a devise to the first son to be begotten¹; or of a devise to the first son of *J. S.* when he shall be born².

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Civil persons also, as executors or the like, may take by devise, as well as natural persons, and that under particular circumstances, although they are not *in esse* at the time of the devise; as where a devise is to the executors of executors in their civil capacity³. But parishioners are not such civil persons as are capable of taking lands as devisees thereof in that character⁴: therefore a devise of lands to the parishioners of *D.* is void⁵.

Civil persons.

But every devisee, whether he be a natural person or a civil person, must be properly ascertained, either by nomination, as by the christian or surname of the party, or by description, as the lord treasurer, the bishop of *B.* or the like⁶. And where a devisee is ascertained by description, that description may be made good by reputation, although it be not strictly true. As, if a devise be to "*Jane my daughter,*" or to my sons *A.* and *B.* this will be a good devise to them, if they were reputed so to be, although they were bastards⁷; for, in the case of a devise, any thing that amounts to a *designatio personæ* is sufficient; and though, in strictness, they are not the sons and daughters of the testator, yet, if they had acquired that name by reputation in common parlance, they are to be considered as such⁸.

But this does not extend to a bastard born after a will made; for the law will not expect that any such should be, nor will it give liberty or scope to provide for such before they come *in esse*; and a bastard cannot take by such description, unless he be such a person who is

¹ *Per Cur.* 2 Salk. 230.

² *Kelton v. Bide*, cited

³ Keb. 300.

⁴ Pow. Dev. 337.

⁵ Broke, tit. Dev. 55.

⁶ Ibid. 77.

⁷ Hob. 32; Co. Lit. 32.

⁸ Dyer, 329, pl. 29; S.C. Jenk. Cent. 239; 41 Edw. 3, 13; *et vid.* 1 Sid. 149; 39 Edw. 3, 24; 3 Leon. 48.

⁹ *Per Chan.* in *Rivers's* case, 1 Atk. 410.

DEVISE

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Civil persons also, as executors or the like, may take by devise, as well as natural persons, and that under particular circumstances, although they are not *in esse* at the time of the devise; as where a devise is to the executors of executors in their civil capacity³. But parishioners are not such civil persons as are capable of taking lands as devisees thereof in that character⁴: therefore a devise of lands to the parishioners of *D.* is void⁵.

Civil persons.

But every devisee, whether he be a natural person or a civil person, must be properly ascertained, either by nomination, as by the christian or surname of the party, or by description, as the lord treasurer, the bishop of *B.* or the like⁶. And where a devisee is ascertained by description, that description may be made good by reputation, although it be not strictly true. As, if a devise be to "*Jane* my daughter," or to my sons *A.* and *B.* this will be a good devise to them, if they were reputed so to be, although they were bastards⁷; for, in the case of a devise, anything that amounts to a *designatio personæ* is sufficient; and though, in strictness, they are not the sons and daughters of the testator, yet, if they had acquired that name by reputation in common parlance, they are to be considered as such⁸.

to a bastard born after a will expect that any such devise or scope to provide for a bastard cannot be such a person as

¹ Dyer, 25, 26, 27.
Jenk. Cont. 25, 26, 27.
13; 4 M. 25, 26, 27.
Edw. 2, 25, 26, 27.
² 11 M. 25, 26, 27.
cont. 25, 26, 27.

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reputed a son, and none can gain that character by reputation at the instant time of his birth, but it must be by continuance of time and reputation of the country, and not of the father himself. And then, if he cannot take as described at the time of his birth, he never afterwards shall take, for the law will not expect longer for the raising a reputation. Thus the opinion of the greater part of the Justices in Serjeant's Inn on this point was, that a remainder to a man's first reputed son nor bastard was not good; because the law did not favour such a generation, nor expect that such should be, nor would suffer such a limitation for the inconvenience that might arise thereupon^u. And the law is the same as to a bastard *in ventre sa mere*; for, as a bastard cannot take until he has got a reputation of being such an one's child, that reputation cannot be gained before the child has been born^x.

A woman also may take as devisee by the name of *wife of such an one*, although she be not his lawful wife, if she be reputed or known by that name^y.

Also, a devise to the son, or eldest son of such an one, will be a good description of a devisee^z. So the first and eldest son, not heir at law, will be a good description, if the person intended by the testator be sufficiently indicated by the general scope of the will; for *per* Hardwicke, Chanc. the only question is, whether the limitation can be reduced to a certainty; for if the intention of the testator can be found out, the court is obliged to follow it^a.

And an elder daughter may take in preferment to her sisters under the description of the next of kindred and

^u *Blodwill v. Edwards*, Cro. Eliz. 509, 510; *et vid.* Co. Lit. 3, b. 123, b; and *Metham v. Duke of Devonshire*, 1 P. Wms. 529.

^z *Metham v. Duke of Devonshire*, 1 P. Wms. 530.

^y Hob. 32; *et vid.* 8 Rep. 73, a; the word, "Wife," in

32 Hen. 8, c. 28, used to describe the person only who shall enter.

^a 1 Rol. Abr. 837, pl. 13; and *Archer's case*, 1st Rep.; *King v. Melling*, 1 Vent. 225.

^x *Marwood v. Darell*, Ca. T. Hardw. 91.

blood of the devisor. Thus, where *H.* having a son and four daughters, viz. *A. B. C.* and *D.* devised lands to the son in tail, remainder to *B.* and *C.* for life, remainder *proximo consanguinitatis et sanguinis* of the devisor, it was held by the whole court, that it vested immediately on the death of the devisor in the eldest daughter only, and not in all the daughters, and did not wait the determination of the particular estate, and would at her death go to her heirs, because limited *proximo consanguinitatis*; for although all the children stood in equal proximity, yet the elder daughter was the most worthy^b. But if *A.* the elder had died before the testator, then it would have vested in *D.* the younger daughter, *B.* and *C.* being excluded on account of the express estate limited to them, and *D.* being at the time when the devise vested, daughter and consequently nearer of blood to her father than the grandchildren, the heirs of *A.* because the former was the testator's own child, the latter were the only children of the testator's child^c.

So an elder daughter may take by devise, as a special heir by particular description. Thus, where *E.* devised lands to the use and behoof of the heirs of the body of *R.* lawfully issuing, the elder of such issue, and his, her and their heirs, to inherit and take place before the younger of such issue, his, her and their heirs, with remainders over. *R.* died, leaving two daughters, *A.* and *J.* and no other issue. And on a question, whether *J.* took any estate in the lands devised, De Grey, Chief Justice, observed, that there was no doubt of the testator's intention that the eldest daughter should inherit before the younger; but how to effect that intention, consistently with the rules

^b *Perriman v. Pierce*, Bend. Ca. Abr. 212, pl. 4, the fact of the younger daughter being living is omitted; and *Harg. Note Co. Lit.* 10, b, reported from *Hales's Miscel.*: but in 1 see *Dyer*, 373, pl. 15. *Palm.* 303; 2 *Roll. Rep.* ^c *Ibid.*; *et per Wilby*, 30 256; *Bridg.* 14; and 1 *Eq. Ass.*; 4 *Bro. Dev.* 21.

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of law, was the difficulty. It had been held, that the heir who takes by purchase may be a qualified heir, and not heir general: then could not one of two sisters be considered as a qualified heir? And the court certified, that *A.* took, in the first place, an estate-tail in the whole of the lands, and that *J.* likewise took an estate-tail in remainder expectant on the determination of the said precedent estate-tail in the whole, with remainder over^d.

So a devisee or devisees may be constituted by the description of child or children. Thus, where a devise was to *W.* and his wife, and, after their death, to their children, it was adjudged that the children of *W.* took only an estate for their lives^e. And so it is if lands be devised to *A.* and to his children. *A.* then having children: the children, in that case, take estates for life only under the devise, as a *descriptio personæ*^f.

But where a man had issue a bastard, and afterwards married, and had issue two sons, and then devised to his children, the better opinion seemed to be, that the bastard could not take by the will, inasmuch as he was *nullius filius*^g. So, where *A.* had issue three sons, and the eldest was a bastard, and a remainder was limited to the eldest issue of *A.* the second son, who was *a mulier*, was held to take, and not the bastard; for, in general words, the construction shall be in *digniori sensu*^h. But yet, if the mother of the bastard made such a devise, the bastard might, it was said, clearly take, inasmuch as he was clearly known to be the child of his motherⁱ. Lord Coke, however, it is to be observed, in speaking of the statutes of the 32d and 34th Hen. 8, says, that when the statute of wills speaks of children, bastard children are not within the statute, and that the bastard of a woman is no child within those

^d *Henry v. Purcel*, 2 Blac. Rep. 1002.

^e *Wyld's case*, 6 Rep. 17, a.

^f *Ibid.* 17, b.

^g *Moore*, 10, pl. 39.

^h See *Badwell v. Edwards*, Noy, 35.

ⁱ *Moore*, 10, pl. 39; and see Noy's Rep. 35.

statutes, even where the mother conveys land to him^k; and Lord Coke's doctrine is agreeable to other authorities^l.

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And where a devisee is appointed by description, that description may be either general or special. As, where one devises land to his wife for life, remainder to *I.* his son and the heirs male of his body, and if *I.* dies without heirs male, remainder to the next heir male of the devisor, and the heirs male of his body, here the next heir male of the devisor is constituted devisee by general description^m.

General or
special descrip-
tion.

And a devisee may be constituted by a devise to a stock, or family, or house, and it shall be understood of the heir as principal of the house; for it is doubtful what is the precise meaning of the testator as to which of the stock, family, or house, should be included as devisees; and, therefore, the case being doubtful, the law shall prevail, which always favours the heir, who is considered as the chief, most worthy, and eldest of the familyⁿ. Upon the same principle, if lands be devised to the posterity of *A.* the lineal heir, if there be any, shall take them under the word posterity; but if *A.* die without issue, and there be no lineal heir of *A.* the collateral heir of the whole blood shall take them^o.

And a devisee may be described as the next of the name of the testator; and the next relation of his name, whether it be male or female, shall take as devisee under such description^p. So, a devisee may be described as next of kin of the name of the testator, and it will be good^q. So to the nearest *relation* of the name; and these words operate as *nomina collectiva*: and, where *nomen collectivum* is

^k Co. Lit. 123, b.

^l See Dyer, 345.

^m 13 Hen. 6, 12, a, b.

ⁿ Hob. 33; *Chapman's* case, Dyer, 333, b.

^o See 2 Eq. Ca. Abr. 290, pl. 7.

^p See *Bon v. Smith*, Cro. Eliz. 532.

^q See *Jobson's case*, Cro. Eliz. 576.

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used to describe the devisee, the term used comprehends all the testator's family who are nearest to him in the degree mentioned. Thus, where one devised her estates, real and personal, in trust, upon the death of *W.* under twenty-one, to convey the same to her nearest relation of the name of Pyot, his or her heirs, executors, &c. *W.* died under twenty-one, and at the death of the testatrix there were three persons then actually of the name of Pyot; namely, a man and his two sisters then unmarried, and also another sister originally of that name, but married at the time of making the will. At the time of the contingencies happening, there was also another person, who was heir at law to the testatrix, and also of the name of Pyot, but more remote in degree than the others. Pyot, the heir at law, insisted, first, that this devise to the nearest relation was void for uncertainty, because the word relation was not *nomen collectivum*; for no words were of that description, except such as had no plurals, as stock, heir, or the like. Secondly, that if it was not void, then the heir at law was the person meant by nearest relation; that the testatrix had in view a single person, and could not intend to give it to all her relations'. But Lord Hardwicke, Chancellor, said, that a devise was never to be construed absolutely void for uncertainty, unless from necessity. Then the question was, whether there was such uncertainty in this devise over; and if there was a necessity to take this to relate to a single person, it would be so, as there were several in equal degree of the name of Pyot. But his Lordship did not take it so: the term "relation" was *nomen collectivum* as much as heir or kindred. In common parlance, relation, in the singular number, was used as *nomen collectivum* in the same sense as kindred; and no difficulty arose from the word *his* or *her* in the case, any more than where the word heir was used. He said, he thought the Pyots described a particular stock, and the name stood for

· *Pyot v. Pyot*, 1 Ves. 335.

the stock, but yet it did not go to the heir at law, as in the case of *Dyer*^{*}, because it must be nearest relation, taking it out of the stock; from which latter case it also differed, as the personal was involved with the real estate, and it was meant that both should go in the same manner.

And if the devisor explains who he means by nearest relations, persons may take under that description who are not strictly so circumstanced in point of kindred. As, if lands be devised to be divided between the nearest relations of the testator, namely, the Greenwoods, the Everetts, and the Downs; the Everetts, it seems, might take, though not in the same degree of relation as the Greenwoods and the Downs, nor within the degree of nearest relationship[†].

If a person, being married, describe his devisee by the term "nearest relation, according to the statute of distributions," his wife cannot take; for she is no relation to her husband in the sense in which that word is there used[‡], because it is transferred to a personal sense, and as if he had said kindred; and kindred, in the statute, means kindred by blood only, and the wife is no relation by blood or affinity[§]. *Non affinis est sed causa affinitatis; affinis ab eodem stipite.* And there would be no difference in such a case as that last mentioned, whether the terms used by the testator were, my relations, generally, or, my own relations; for, in both cases, relations by blood only are included: and even if the reference to the statute of distributions be omitted in such a devise, the wife cannot, it seems, take within the description of a near relation; for, in the case of *Thomas v. Hale*, Lord King determined, upon the authority of Lord Macclesfield, in the case of *Brown v. Brown*, that the word "relations" should be

^{*} *Chapman's case*, *Dyer*, Ves. 84; *Worsly v. Johnson*, 3 Atk. 759, 761.

[†] *Greenwood v. Greenwood*, cited 1 Bro. Ca. Cha. 32.

[‡] See *Davies v. Bailey*, 1

[§] Skinner, tit. Cognatia Parentela; Calvin's Lexicon, tit. Affinitas.

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confined to such relations as were within the statute of distributions, because of the uncertainty of the word relations^r (1).

Where heir or issue is word of purchase, and where word of limitation.

It having been, during the prevalency of the feudal system, a fundamental principle of our law, that an heir should not take a contingent remainder of an estate as a purchaser, where his ancestor took a freehold estate by the same conveyance; because such dispositions, while fiefs were predominant, tended to defraud the lord of the fruits of his tenure, by enabling the heir, with the concurrence of his ancestor, to take the estate as fully as by descent without the feudal burthens to which he would have been liable had the estate descended; it became a rule of construction, applicable to all instruments so conceived, that the estate limited to the heir, though meant to be contingent, should, in law, be considered as vested in the ancestor: in consequence of which conclusion of law, every devise in which an estate of freehold or frank-tenement was given to the ancestor, with an immediate or mediate remainder thereon, limited to his heirs, or heirs in tail, or issue, (the

^r 2 Eq. Ca. Abr. 332, pl. 9, 368, pl. 13; Ca. T. Talbot, 251.

(1) But it is observable, that the question there arose respecting personal property, and therefore, from the nature of the subject matter, furnished a ground for resorting to that statute, to determine what the testator meant, which was one ground of Lord Hardwicke's judgment in *Pyot v. Pyot*. But there seems to be no reason, in case of a devise of land so conceived, for referring to that statute in order to decide upon a term applied to a subject to which that statute has no reference, unless it be, that the question being of a testamentary nature, any decision upon a testamentary subject, from which an analogy may be drawn, should be resorted to, rather than the evident intent of a deviser to give should be disappointed upon the foundation of his having expressed himself with an uncertainty not to be cleared up. It seems, therefore, very questionable what would be the fate of a devise of lands only to the "relations" of the devisee. See Pow. Dev. 352.

latter term being considered, in a devise, as a word of limitation, and synonymous to the word heir), was considered as furnishing incontrovertible and conclusive evidence of an intent in the devisor to give an estate in remainder, immediately executed in the ancestor so taking the freehold, and not contingent in the heir or issue; such a limitation being considered technically, as importing an intent in the devisor so to convey. And although, by the abolition of tenures, the foundation upon which the principle was adopted, which gave rise to that rule of construction, failed, yet the technical import of such a limitation being established, the construction of the instrument continued the same, the presumption being, that the words were used, notwithstanding tenures had ceased, in their common and ordinary acceptation. Hence it follows, that the words heir or issue, when so used in a devise, cannot take effect as a description of the person to take as a purchaser. But, although the alteration of the state of the subject to which the words in such a devise applied, was held not to furnish a reason for altering the construction of such limitations, because the language that constituted them having gained, by usage, a fixed technical import, such an alteration would have been productive of more mischief, by the confusion that would have followed in mens ideas respecting the disposition of their estates, than could have been compensated for by any benefits that could have arisen by departing from the rule; yet it by no means followed, that, when the foundation of the principle, upon which the rule was grafted, failed, the rule that had been raised upon it should be extended beyond the precise limits it had at that time reached. From the period, therefore, when the principle of the rule ceased to operate, the courts of law and equity seem to have been as industrious to take devises out of that rule of construction, in favour of a contrary intent, where such intent was clear, and must necessarily be collected from the devisor's

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language, as they were before astute in their endeavour, by construction, to bring cases within it. The issue or heirs of a devisee may now therefore take, under that description, contingent remainders as purchasers, notwithstanding a previous freehold is limited to their ancestors by the same devise, if there be language so modifying and qualifying the limitation as to make it not quadrate exactly with the rule: but such limitation will conclusively be considered as being within the rule, unless the devise be so conceived as necessarily to import an intent in the deviser, that his devisee in remainder shall take an executory estate as an original purchaser of a contingent remainder, and not an estate in remainder executed through the medium of the ancestor.

A devisee, therefore, may now be described by the "heir" or "issue" of one who takes a previous freehold by the same devise, if the testator plainly show that the term "heir" or "issue" was meant by him to be understood as a *descriptio personæ*. Thus, in *Haddon's* case, where a devise was to one for life, and so afterwards to every person that should be the testator's heir, for life only, it was adjudged in the Common Pleas to carry an estate in possession to the tenant for life, with a remainder for life to the next heir, and nothing more². So a devise of lands to *J. S.* and to his eldest issue male, he having no son at that time, was adjudged not to be an estate-tail, but for life only; and it was said that it would have been all one if he had had a son³. But if the limitation in *Haddon's* case had been to *A.* for life, and after to every person who should be his heir, one after another, for the term of the life of every such heir only, it would have been void; for, if it had been good, the inheritance would have been in nobody, and that would have been

² *Haddon's* case, cited Saville, 75; Cro. Eliz. 40; Moore, 372.

³ *Lovelace v. Lovelace*, Moore, 121; 2 Bulst. 180.

contrary to the rules of law, so note the distinction. . The same point was adjudged, as to the words "issue male" being a good description of the person of the devisee, in the case of *Luddington v. Kime*, where *A.* devised lands to *B.* for life, without impeachment of waste, and, in case he should have any issue male, then to such issue male and his heirs for ever. Here the subsequent limitation to the issue male of *B.* was held not to make him tenant in tail, but to be a contingent fee to his issue male, who took by way of purchase, as a devisee specifically described^b.

So, where the limitation was to one for life only, and after his decease to the issue male of his body, and to the heirs male of the bodies of such issue, the word "issue" was considered as a description of the person who was to take the estate-tail^c.

The principle upon which these cases are considered as not falling within the rule before mentioned seems to be, that the word issue, being in its most proper and technical sense descriptive of the person, and only taken as a word of limitation to effectuate the intention of a testator, (though it shall be taken in the same sense when it militates against his interest, as it shall be taken in when it operates in favour of his interest, where it is used in the same manner, and therefore shall be considered as a word of limitation, as well where the consequence is to give effect to proceedings that destroy his estate, as where the consequence is to give effect to his claim against any act of the tenant for life, which would, if it were considered as contingent, militate against his interest), yet it shall, when it is evident, from the testator's manner of expressing himself, that he meant to use it in its proper sense, viz. as a description of the particular person to take, and not as *nomen collectivum*, take effect in that sense, and in no

^b *Luddington v. Kime*, 1 Salk. 224; Lord Raym. 203; ^c *Backhouse v. Wells*, 1 Eq. Ca. Abr. 184, pl. 27. 3 Lev. 435.

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other^d. Now where a testator superadds words of limitation upon the word "issue," it may fairly be inferred, that he did not use the word "issue" in its collective sense; for if he had, it would have embraced that description of persons, to include which he has used the latter words of limitation superadded. The word issue, therefore, in such case, is understood in its common and ordinary signification, *i. e.* as a description of the person to take. And this accounts for the distinction between a description by the word "heir" or "heir male," and by the words "issue male," when accompanied with such superadded words of limitation; for the words "heir" or "heir male," (being according to their proper technical import, words of limitation, *i. e.* *nomina collectiva*, and never taken as words of purchase, *i. e.* a *descriptio personæ*, except to answer the evident intent of testators), will not be restrained to the latter signification, by merely superadding other words of limitation; for such other words are only a repetition of what is before expressed by the words "heir" or "heir male," in their technical import, because they include the subsequent words of limitation, *viz.* "and his heirs," or "the like;" for every heir male, of the body of the heir, is, in construction of law, an heir of the ancestor himself^e: for which reason the words added are considered as words merely declaratory, and do not restrain the effect of the former words; and therefore, where lands were devised to *J. H.* for life, then to the heir male of *J. H.* and his heirs, and for want of such issue, then over: Lord Keeper Henley held, that *J. H.* took an estate-tail, notwithstanding that the words heir male were in the singular number, and attended with superadded words of limitation in fee^f. And where there was a devise to *M.* and his wife for their lives, remainder to

^d See *Strange*, 731; 1 Rep. 103, b; 1 Anders. 132; Cro. Eliz. 40; Moore, 371; Pow. Dev. 360.

^e See *Dubber v. Trollop*, cited 1 Atk. 412.
^f *King v. Burchell*, 3 Burr. 1103.

the next heir male of their two bodies, it was held a devise in tail^a. So, where a devise was to one for life, and after his death to the first heir male of his body, remainder over, it was held that the first devisee took an estate-tail^b. The foundation of all which cases appears to be, that neither words of limitation superadded on the word "heir" in the singular number, nor the words first, next, or eldest, preceding the word heir, are sufficient to show an intent in the testator to control its technical import; for, neither of them furnish a ground from which it must necessarily be inferred that the testator meant to use the word "heir" out of its ordinary sense, in which it operates, universally, as *nomen collectivum*; because if words of limitation only be superadded, it is merely *expressio eorum quæ tacite insunt*; for the word "heir" imports the heirs of such heir^c; so the words next, first, or eldest, when preceding the word "heir," only express that which the word "heir" itself implies, viz. first, next, or eldest, taken for the future time, the one to succeed to the other from time to time, according to the course of the common law. Consequently, a devisor may use either of these expressions without any intention to alter the technical import of the word to which they are joined^d.

But the word "heir" may also operate as *descriptio personæ*, whereby a testator points out who shall be his devisee, if he add words to the term heir; from whence it must necessarily be implied that he meant to use it in that sense. And therefore, where a limitation was to A. for life, and after to the next heir male of the body of A. and to the heirs male of the body of such next heir male,

^a *Miller v. Seagrove*, Rob. Gavelk. 96; and see 1 Ves. 337.

^b *Trollop v. Trollop*, Rob. Gavelk. 76; 1 Atk. 421; and see *Goodright v. Pulleyn*, 2 Lord Raym. 1437.

^c *Minshul v. Minshul*, 1 Atk. 411.

^d *Chapman's case*, Dyer, 333, b; but see *Cheek v. Day*, Moore, 593; 2 Rel. Abr. 417, G. pl. 7; Cro. Eliz. 313; Ow. 148, cited Lord Raym. 205; Fitzgib. 24.

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the devise to the next heir male was held to be remainder vesting in him by purchase¹; because, if the words "next heir male" were taken in a collective sense, the superadded words of limitation, viz. "and to the heirs male of the body of such next heir male," must have been rejected; and if the words "heir male of the body of A." had been taken in its collective sense, both the words "next," preceding the word heir, and the subsequent limitation, must have been rejected; and the limitation, being to the next heir male, could not give the fee-simple to the ancestor, and an estate-tail in the ancestor would not answer the superadded words of limitation to the heir; besides which, the words of limitation superadded are particular; for in them the testator shows that he had a different idea of the effect of the terms, "next heir male," in the singular number, from that which he had of the effect of the terms "to the heirs male of the body, &c." in the plural number, or otherwise he would not have expressed himself, in the superadded limitation, in the plural number: therefore, the words "to the heirs male of the body of such next heir male," preclude the objection to the uncertainty of the testator's intent, which exists in the former cases put, because it is limited "to the next heir male of A. and to the heirs male of the body of such next heir male," which, in other language, is tantamount to a limitation "to the next heir male of the body of A. and his heirs male; in which mode of expression, the words "his heirs" would show that the word "next" was meant to confine the word "heir" to a particular person, in like manner as in the preceding case of *Luddington v. Kime*, the words "his heirs" were considered as explanatory of the intent of the testator to use the word issue in a sense applicable to one issue only.

The above cases are referrible to the class of devisees taking by nomination; but a devisee may also take by

¹ *Archer's case*, 1 Rep. 66.

special description, operating as an actual description of a particular person meant. As, where a devise was by these words, "I give the fee-simple of my house in C. to my cousin A. L. and after her decease to W. L. her son," (which W. L. was her heir-apparent). Here A. L. had an estate for life, remainder to W. L. her son for life by special description, remainder to A. L. in fee^m. So, where a man devised lands "to A. and his heirs during the life of B. in trust for B. and after the decease of B. to the heirs male of the body of B. now living," B. having one son then living. By this devise, a remainder was immediately vested in the son; for the words "heirs male now living," in a will, were a full description of the son, who was then the heir-apparent of B. and known by the deviser to be soⁿ. So, if a man devise to his heirs in borough English, or to his heirs in gavelkind, such special heir shall take, although he be not heir-general at common law; because he is specifically described, and distinguished from the heir-general at common law^o.

But as it is necessary to the constitution of a devise, that there be a devisee certain, or capable of being made so, the law requires every one, claiming in that character, to answer, in all respects, the description the deviser has given. Thus, if one claim under the description of heir, he must show that he is heir in that sense in which the testator has used the term. Now an heir may be such in four ways: first, heir with relation to the ancestor of the person so described, as heir general; secondly, heir by particular description of the testator, as heir special; thirdly, heir with relation to property, or to the thing to be inherited; fourthly, heir by inference. With respect to heir with relation to the ancestor, it is clear one cannot make another heir, unless he be strictly so. Therefore the word

^m *Chycke's case*, Dy. 357.

2 Vent. 311, by names of *Burchet v. Durdant*; Raym.

ⁿ *James v. Richardson*, T. Jon. 99; 1 Eq. Ca. Abr. 214, 330; 3 Keb. 32; Pol. 457.

pl. 11; S. C. 1 Vent. 334;

^o 2 Vern. 733.

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"heir," in this sense, will not serve for a name of purchase, if the person claiming be not lawful heir. Consequently, where *A.* devised that the heir of *B.* should sell his land, and *B.* was attainted of felony in the life-time of *A.* and then *A.* died: the eldest son of *B.* could not sell the land; for he was not heir, because the blood was corrupted^p.

An heir by particular description of the testator may be either of heir-general or heir-special. Since, wherever a testator describes his devisee as heir of any one, generally, none can take under that description, unless he fully answer it in all particulars, it follows that none can take as such during the life of his ancestor; for, *nemo est hæres viventis*. Therefore, where one, having issue two sons and two daughters, devised his lands to his younger son in tail, and, for want of such issue, to the heirs of the body of his eldest son, and if he died without issue, that the land should remain to his two daughters in fee. The testator died; the younger son died without issue, living the eldest son, who had issue him who was tenant in the assize. It was contended, that, notwithstanding that by way of grant, the son, living his father, cannot take as heir, (*i. e.* by limitation as heir to his father), because none can be said to be heir to his father, as long as his father be alive; yet, by way of devise, the law should favour the intention of the party, and the intent of the devisor should prevail. But the court were unanimously against it; and held, that it was all one in the case of a devise as of a grant^q. So, where lands were devised to *A.* for life, and after to the next heir male of *A.* and the heirs male of the body of such next heir male; *A.* having issue a son, made a feoffment to *B.* upon whom the son entered; and it was adjudged that the entry of the son was not lawful, for the remainder could not vest in him, living his father, because

^p Jenk. Cent. 203.

^q *Challoner v. Bowyer*, 2 Leon. 70; S. L. Dyer, 99, a, pl. 64.

it was limited to the next heir male of *A.* and *A.* could have no heir male during his life¹.

And upon the same principle as that upon which the preceding cases are determined, it is held, that if a testator describe any particular heir, as heir male, or heir female, or heir of his name, or the like, the person to take thereby must answer the description in both particulars; *i. e.* he or she must be very heir, as well as male or female, or of the testator's name; because these words operate on the first taker as a *descriptio personæ*, and name of purchase². Thus, where *B.* having issue three daughters, devised hereditaments to his wife for life, remainder, after her death, to his executors, until out of the profits they had received a certain sum for preferment of his daughters; and then the hereditaments to remain to his right heirs male for ever; and if his heirs male should disturb his executors in receiving the profits, that then their estates should cease, and the land should be divided among the daughters then living, and died. *W. B.* was found to be heir male of the testator. But the court of King's Bench held, that he could not take the remainder, because the three daughters were the heirs general: and this judgment was affirmed in the Exchequer Chamber³.

And the rule of law is the same as to trust estates so devised⁴.

But if the testator clearly show by positive words, or if it must necessarily be inferred from facts that he meant one to take by the description of a particular heir, who was not general heir, that intent will be carried into execution. As, if one devise, in these words—"I give to my heir male, which is my brother *A. B.*;" this will be a good

¹ *Archer's case*, *supra*; F. pl. 5; and see *Counden v. Clerke*, Moore, 860; S. C. 1 Rep. 66.

² See Bro. Abr. tit. Done, Hob. 29; *Dawes v. Ferrars*, 61. 2 Wils. 1.

³ *Ashenhurst's case*, cited Hob. 34; 2 Rol. Abr. 416, ⁴ See *Starling v. Eltrick*, Pre. Ch. 54.

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devise to *A. B.* although the testator have a son, who is heir general^x.

So, if a man, having a house or land in borough English, buy lands lying within it, and then by his will gives his new purchased lands to his heir of his house and land in borough English, for the more convenient use of it, such heir in borough English will take the land by the devise as *haeres factitiores* or *factus*, not *natus* or *legitimus*; for the intent is certain, and not conjectural^y.

And, upon the same principle, one may take by special description as heir, even in the life-time of his ancestor, if the testator evince his intent so to be; as, if he take notice that the ancestor is living. Thus, where *S.* after devising hereditaments to trustees for twenty-one years, for the payment of debts, &c. settled the same on the first son of his body lawfully begotten, and the heirs male of the body of such son lawfully issuing, and for default of such issue, to his cousin *J. S.* for ninety-nine years, if he should so long live, remainder to his first and other sons in tail male, and in default of such issue, remainder to the heirs male of the body of the testator's aunt, *E. L.* lawfully begotten, and for default of such issue, remainder to his own right heirs. The testator also gave a legacy to his said aunt *E. L.* whereby he took notice that she was living, and that she had three sons, *A. B.* and *C.* to whom he gave a legacy of 500*l.* He likewise gave to *D. B.* who was his heir at law, an annuity out of the said hereditaments, of 150*l.* per annum, and to her children 500*l.* a-piece. Afterwards the testator died without issue, as did also *J. S.*; upon which the question was, who was entitled to the testator's real estate, whether his heir at law *D. B.*, or *A.* the eldest son of the testator's aunt *E. L.*? And it was adjudged in the Exchequer, which judgment was afterwards reversed in the Exchequer Chamber, and that reversal reversed in the House of Peers, that *A.* was entitled

^x Hob. 34.

^y Ibid.

under this devise²; and the principal reasons upon which the Court of Exchequer founded their judgment, and upon which the House of Lords affirmed it, were, because it was evident, from the whole will, that he was the person manifestly designed to take by the appellation of the heir male of the body of the testator's aunt *E. L.* lawfully begotten, before the heir-general of the testator, who was to take no more than an annuity, so long as there should be issue male of his aunt; and then, although the word heir, in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living. Then, when the testator also took notice that *E. L.* the ancestor was living at that time, and gave her a legacy, he could not intend that the first son should take strictly as heir, which was impossible if she was living, but as her heir apparent he might intend him to take.

But there were formerly great doubts entertained, whether, if an estate were given to one, remainder to the heirs male or female of his body, it would be necessary that the person to take should be heir as well as male or female; or whether, under such a description, a special heir male or female might not take, notwithstanding there was an heir general *in esse* of a different description³.

But in a case sent to the Court of King's Bench out of Chancery, that court, in express terms, certified that, as well on a deed as a will, where a third person, not an ancestor of the grantee, gave an estate to a person by the description of heir male of the body of *H. P.* one answering that description might take as special heir, although there was an heir general in being, a complete heir of the

² *Darbison* on dem. *Long v. White*, 2 H. Blac. Rep. 1010.
³ *Beaumont*; 1 Will. 229; 1 Brown Par. Ca. 489; and see *Goodright* dem. *Brookin* See Co. Lit. 24, b.

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person from whose body the entail was to issue. And the same point was resolved in the Court of Exchequer^b.

An heir may, thirdly, be such with relation to property, or the thing to be inherited. And such heir may be either, by appellation, by inference, by custom, or by accident.

1. By appellation; for it is said by Hobart, that, although none can be truly heir but him that the law makes so, yet there is also an heir by appellation and vulgar acceptance, which imitates the state of a true heir^c. As if one, by will, devise that his wife shall be sole heir of his real estate; or, that *J. S.* shall be heir of his land^d. In this case, *J. S.* shall have the land in fee, for such estate as the ancestor who constituted them respectively had; for the word heir shall relate to the same estate that the party, who made the others heir, had in the land.

2. By inference; as if one be, by will, constituted heir without mentioning the land, and there be other matter therein, from whence it must necessarily be inferred that the land was intended to pass, or that the devisee was intended to be made heir, he shall take as such. As if a man has issue three sons, and devise his lands one part to two of his sons in tail, and another part to the third son in tail, and that neither of them shall sell either part, but that each shall be heir to the other, and die, and then one of the younger sons die without issue; his part shall not go to the elder son, but shall remain to the other sons; because the words, that the one shall be heir to the other imply a remainder, viz. that each shall be in remainder after the other^e. So, where one devised in these words, "I make my cousin, Giles Bridges, my sole heir and executor^f," it was held, that the devisee should have the

^b See Co. Lit. 164, a. n.
(2.)

^c Hob. 75.

^d *North v. Crompton*, 1 Ch. Rep. 196; *Noy*, 48; Hob. 34; *Styles*, 308.

^e *King v. Remball*, 1 Rol. Abr. 833.

^f *Taylor v. Webb*, *Styles*, 301, 319, 407; and S. L. 3 Keb. 49, pl. 23.

devisor's lands in fee; for, *per* Roll, Chief Justice, although the words of the will be not proper, yet we may collect the testator's meaning to be, by making the party his heir, that he should have his lands; and it is all one as if he had said, "my heir of my lands." And here he not only makes him his heir, but his executor also, and, therefore, if he shall not have his lands, the word heir is merely nugatory and to no purpose, for, by being executor only, he shall have the goods. In such case, therefore, he is *hæres factus*, not *natus*. *Et per* Jerman, Justice, the word heir implies two things; first, that he shall have the lands; secondly, that he shall have them in fee-simple: and the other Justices concurred.

3. By custom, or reference to custom. Thus custom makes one, not heir at law, a man's heir in borough English. So one may make a man, not his heir, heir to him by reference to a customary heir. As if a man, by his will, give new purchased lands to his heir of his house and land in borough English, for the more commodious use of it; there, the youngest son, i. e. the heir in borough English, shall take.

4. By accident, as in the case of a *possessio fratris*, which *facit sororem esse hæredem*; for, from this expression of Littleton, it is to be implied that, in this case, the sister is *hæres factus*; and that the law, without other act, does not make the sister heir, but the younger brother is, though of the half-blood, after the death of the elder brother, *hæres natus* to the father; for if the elder brother, neither by his own act, nor by the possession of another, gain more than descends to him, the brother of the half-blood shall inherit. So that the sister is made heir by some act either of the brother, or some one for him, which gives him actual possession of the fee or freehold; and if the elder brother has not actual possession, or if it be such an inheritance of which an actual possession cannot be gained, it shall by law descend to the younger brother of the half-blood.

* 3 Co. 41, b. 43, a.

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In all these cases of description of the person, if it be made with sufficient certainty, so that the person intended may be distinguished from every other person, trifling omissions or misprisions will not make the devise invalid; for the use of names or descriptions are but to make a distinction between person and person, and therefore it is sufficient if the person be so called or described, that he may be distinguished from every other. And this holds, both in cases of civil and natural persons.

As, where a devise was to the master and wardens of the mystery of cordwainers, London, who were incorporated by the name of master, warden and commonalty, the question was, if by reason of this misnomer of the corporation, the devise to them was void? *Et per Curiam*, the devise is good; for, by the intendment, the devisor had not counsel, nor had cognizance of their name, and, the corporation being known usually by that name, there was a sufficient intendment what corporation he did intend should have it ^b.

So if one be known by the name of Edward Williamson, whereas his real name is Edward Anderson, and lands are given him by the name of Edward Williamson; the same is a good name of purchase ^c. So, where a devise was to Margaret, the daughter of W. K. and her name was Margery, it was held that she should take, for the person meant is clear by the description ^d.

So if a devise be to William Earl of Pembroke, or William Bishop of Salisbury, and his name be John, the devise is good; there being a sufficient certainty without the christian name; for there can be but one person Earl of Pembroke or Bishop of Salisbury, wherefore the mistaken christian name shall be rejected as surplusage, and the devisee takes as described by his name of dignity or description of his office ^e.

^b *Foster v. Walter*, Cro. Eliz. 106; S. C. 2 Leon. 165.

^c Godb. 17.

^d *Gynes v. Kemsly*, 1 Freem.

293.

^e 1 Inst. 3, a.

But if the description be false, and not merely imperfect, the devise will be void, whether in cases of civil or natural persons. As if one had devised lands to the Abbot of St. Peter, where the foundation was of St. Paul, there the devise had been void^a. So if one devise his lands to the heir of his brother and to his heirs for ever, and his brother, at the time of the devise, be an alien not naturalized, the devise will be void, the reason of which is, that the devisee was falsely, not imperfectly, described; for no alien can have an heir^a. But if, in such case, he who claims under the devise be proved to be the reputed heir of the brother, then, although the father were an alien, the son might take by the devise^o.

IV. WHAT PROPERTY MAY BE THE SUBJECT OF A DEVISE, AND BY WHAT DESCRIPTION.

By the 32d Hen. 8, c. 1, it is enacted^p, that any manors, lands, tenements or hereditaments, of an estate of inheritance holden in soccage or in the nature of soccage tenure, (which all lands now are, except those holden by copy of court-roll,) may be devised by any person or persons, at his free will and pleasure. And by the 34 and 35 of Hen. 8, c. 5, reciting that, some doubts had risen as to the construction of several parts of the above statute, and particularly as to what the legislature intended, in the 7th section, by the words, "estates of inheritance," it is enacted, that those words shall be expounded, taken and adjudged of estates in fee-simple only^q. And by the same act it is also enacted, that "all and singular persons and person, having a sole estate or interest in fee-simple or seised in fee-simple in coparcenary, or in common in fee-simple of and in any manors, lands, tenements, rents or other hereditaments in possession, reversion or remainder, or of rents

^a Hob. 33; Bro. Dev. 2.

^o Per Glyn, Chief Justice.

^a See *Cottingwood v. Pays*, 2 Sid. 151.

¹ Sid. 193.

^p Sec. 1, 2, 3, 7.

^q Sec. 4.

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orservices incident to any reversion or remainder, and having no manors, lands, tenements or hereditaments holden of the king, his heirs or successors, or of any person or persons by knight's service, have full and free liberty, power and authority to give, dispose, will or devise to any person or persons, &c. by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, by himself solely, or by himself and others jointly, severally or particularly, or by all those ways or any of them, as much as in him of right is or shall be, all his manors, lands, tenements, rents and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure."

These clauses of the statutes of wills may be considered, First, with respect to what things the words lands, tenements and hereditaments apply: Secondly, what estates the deviser must have in such lands, tenements and hereditaments, in order to devise them: Thirdly, what estates he may create or devise in them to another^r.

To what things the words lands, tenements and hereditaments, apply. First, all lands not devisable by custom, previous to the statutes of wills, are by those statutes rendered devisable. But a distinction was made as to tenements and hereditaments, between those that were valuable and those that were not valuable, it being held that the latter were not devisable.

The foundation of this distinction between hereditaments not valuable, and those that are valuable, seems to have been taken at a very early period, and arose from the particular wording of the statutes of wills. By the common law, without a custom, inheritances were not devisable. Every devise of them, therefore, not founded upon custom, must be warranted by some statute, otherwise the devise is void. Now neither of the statutes of wills, nor any

^r See Pow. Dev. 219.

other statute, made such a devise effectual; for neither the letter nor the intent of the statutes of 32 Hen. 8, or 34 Hen. 8, authorized it; and to this purpose the words of the statutes should be observed, and particularly of the statute of the 32 Hen. 8, viz. "That all persons having manors, &c. held, &c. by *knight's service in capite*, might devise two parts of his hereditaments in three parts to be divided, or so much thereof as amounted to the annual value of two parts of them in three parts to be divided in certainty and by special division, so that it might be known in severalty for advancement of his wife, &c. and saving to the king the custody of so much of the inheritance as amounted to the real annual value of the third part." Now these words did not reach this kind of thing; for, first, these were inheritances and things entire, not separable, and which could not be divided. Secondly, they were not of any certain annual value: and the statutes, by the first branch of them, required that the inheritances held *in capite*, which were to be devised, should be of annual value. And the saving before mentioned showed, that the intent of the statute was, that hereditaments devisable by that statute should be of an annual value, which these sort of hereditaments were not. And this appeared more evidently to be the law, by the words of the statute of the 34th Hen. 8, whereby it was enacted, that, "if the hereditaments that descended to the heirs after such devise, did not extend to the clear yearly value of the third part, &c. according to the intent of the first statute, viz. the 32d Hen. 8, the king might take so much of the residue of the tenements, as should make the value of the third part with the full profits thereof; and that the division of that, &c. should be made as before was mentioned in the said statute." From which parts of the statutes it appeared that the hereditaments, which these statutes provided for, were hereditaments which had parts and might be divided, so that one part might be severed from the other, and not such as could not be severed nor divided, and of which

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one part could not be severed or divided from the other part, and also should be of annual value, otherwise the devise of them would be void. And in support of this position, the opinion of Prisot, in a case 32 Hen. 8, c. 22, is cited by Lord Coke¹. There, upon a *quare impedit* brought by the king against one who made title to an advowson appendant to a manor of which he was seised by reason of his duchy of Lancaster, the defendant pleaded that, after the last continuance, the king, by his letters patent, ratified and confirmed to him, &c. all the right, &c. and that the said defendant ought not to be further disturbed, &c. and it was said that this plea was not good; and one reason alleged was, because by a statute of Hen. 4, c. 6, "those who demanded of the king lands, tenements, rents, offices, annuities or any other profits, should make express mention in their petitions of the value of the thing so to be demanded, and also of that which they have had of the king's gift, or other his progenitors or predecessors before, otherwise the king's letter patent thereof to be void and of no avail;" and although this were neither land nor tenement, yet by the equity of the statute it extended to all things that were valuable, and the church might be valued; and it was said that the advowson was valuable, for, that if a formedon were brought of it, and the tenant pleaded a release of the ancestor of the demandant, and that he had assets, &c. although that be only an advowson, it should be valued: so that when this were sued for by petition, it might be valued. And Prisot, as to this point, said, it had been alleged that if an office were granted by the king, it was necessary that the grant contained the value of the office; in some cases it was so and in others not. If here the office had been of any certain value, there perhaps it should be so; but if it were of a thing casual, then there was no occasion; as if the king granted a market, it was not necessary to state the value

¹ 3 Co. 33, a.

of it, because it was not annually certain. So, in the principal case, where the confirmation was of the church, it was not necessary for the party to insert the value, because it was not annually certain. From whence Lord Coke deduces this principle, that when the law requires the value of a thing to be mentioned, it must be intended of a thing which is of a certain yearly value, and therefore concludes, that as the statutes of wills authorize the devise of hereditaments held in *capite* valuable and devisable, none but such can, by virtue of those statutes, be devised; consequently that the franchise of *bona et catalla felonum*, &c. not being valuable, are consequently not devisable.

Copyhold estates were not devisable at common law, nor are they become so by the statutes of wills; for, to pass copyholds by devise, there must be a surrender to the use of the last will and testament, which alone gives effect to the limitation therein. And when the uses are named in the will, they take effect by the surrender and not by the will¹.

An advowson may be the subject of a devise; for the body of the statute of wills was, that lands, tenements and hereditaments might be devised; and an advowson was an hereditament departable, as between sisters, and dower might be thereof, and it was valuable, namely, twelve-pence in a pound, as 12 Hen. 8, and other books showed².

But it was held by Lord Hardwicke, in the case of *Westfaling v. Westfaling*³, that an advowson in gross would not pass by the word lands; for when a man devised to his trustees all his freehold lands not under settlement, and whereof he was anyways seised or possessed, or anyway interested in law or in equity, either in possession, reversion

¹ *Royden v. Malster*, 2 Rol. Eliz. 359; 2 Anders. 21; Rep. 383; Coke's Copyh. *Westfaling v. Westfaling*, 3 50; Wood's Inst. 135. Atk. 460.

² *Clere v. Peacock*, Cro. ³ 3 Atk. 460.

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or remainder, which he had any power to devise or dispose of; his lordship said, that there was no authority that an advowson would pass by the word lands, though it would by the words tenements or hereditaments.

But if the will had described lands at a particular place, and the testator had had nothing belonging to him there but an advowson, it seems that, rather than the will should be ineffectual, the advowson would be held to pass; for that case would fall within the principle of the case in *Styles*⁷, where, by the words "fee-simple lands," a portion of tithes were held to pass, there being nothing else belonging to the testator at the place mentioned, but the tithes. But the rule of law is, that if there be estates that properly pass by the words of a will, it shall not be extended to such estates as do not properly pass.

So also a donative may be devised⁸.

As may also the next presentation to an advowson; and a devise of the *next* turn or presentation, carries the next turn of presenting absolutely to the devisee, and not merely the right of getting himself presented⁹.

And by the devise of an advowson the next presentation passes, even though the devisor be himself incumbent of the advowson devised.

Thus where *A.* purchased an advowson to him and his heirs, and, being parson and patron thereof, afterwards made his will in writing, and made three executors, and willed that they or any two of them should present *W. T.* to the said church upon the next avoidance, and afterwards devised^b. For although it was objected, that the presentation arising upon the death of the devisor, was a flower fallen, and so not to be granted after his death,

⁷ *Styles*, 261, 278.

⁸ *Attorney Gen. ad relat. Tracy et al. v. Floyer et al.* 2 Vern. 748.

⁹ *Law v. Bishop of Lincoln et al.* 2 Black. Rep. 1240,

^b *Harris v. Austin*, 3 Bulst. 36; S. C. 1 Rol. Rep. 210; S. P. Dyer, 456; *et vide* *S. L. Hill v. Bishop of London, Smith et al.* 1 Atk. 619,

when the devise was to take effect, yet Coke and three other Justices were of opinion, that it was a good devise; for notwithstanding the will had no effect, but by the death of the devisor, yet it had *an inception* in his life, and that made it good.

Rents are devisable, either by the custom, or by the express words of the statute 34 Hen. 8, but the statute 32 Hen. 8, doth not extend to them. And where lands are devisable by custom, rents out of them follow the nature of the reversion or seignory to which they are incident, and are devisable likewise^c.

Tithes also, of which a man is seised in fee, may be devised as hereditaments^d.

Manors may be devised either by custom, or by the express words of the statutes^e.

So franchises, if valuable and not restrained to the person of the grantee and his heirs, are devisable. But such as are not valuable, are not devisable by the statutes^f.

And it is the same of commons *sans* number, ways, and the like^g, all of which are devisable, unless as appurtenant to other things valuable^h.

So if a man hath an hundred, with the goods of felons, outlaws, fines, amerciaments, return of writs, and such like casual hereditaments within the hundred not valuable in themselves, and such hundred with the casual hereditaments have been accustomedly let to farm for a yearly rent, then it may be devised within the purview of the acts; because the uncertainty hath been reduced to an annual valueⁱ.

An annuity in fee is also devisable, but not a personal annuity, which is distinguished from a rent, inasmuch as

^c Lit. sec. 585; Cro. Eliz. 805; Co. Lit. 111, n. (5). ^e Per Anderson, C.J. Cro. Eliz. 359; 2 Anders. 22.

^d Swinb. 140; Styles, 261.

^h *Butler v. Baker*, 3 Co.

^e 3 Co. 32, b.

32.

^f 3 Co. 32, b; 10 Ibid. 81, a, S. L.

ⁱ Ibid. 33, a.

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the latter is a burthen imposed upon, and issuing of lands, whereas an annuity is a yearly sum chargeable on the person only of the grantor^k.

Titles of dignity, as dukedoms, &c. whilst such dignities were the consequence of territorial possessions, passed as appendant to the land, and, consequently, where such land was by the custom devisable, passed by such devise. But the dignity of the peerage having, after alienations became common, been confined to the lineage of the party ennobled, and holden to be personal instead of territorial, are not now alienable by devise or otherwise.

Offices likewise, being annexed to the person, fall under the like predicament. And corodies are of the same nature; so likewise are franchises, when annexed to the person, and not appendant to lands.

**V. WHAT ESTATES AND INTERESTS IN THINGS ARE
DEVISABLE.**

To what kinds of thing the words lands, tenements and hereditaments in the statutes apply. We now come to the second subject pointed out for our consideration, namely, what estate or interest the devisor must have in such things to enable him to devise them. And, on this head, it is observable, that there is a striking distinction between the customary right to devise, and the power under the statute; for the custom, where it warranted a devise of lands, was general, that every one seised of land might devise it, whereas the statute of the 32d Hen. 8, as explained by that of the 34th Hen. 8, extends to those having estates in fee-simple only; consequently, none are thereby authorized to devise, who have not an estate in fee-simple in the thing devised.

Now there are several estates of inheritance in lands, which are termed estates in fee-simple^l. The first is a

^k Co. Lit. 144.

^l Plowd. 557.

fee-simple absolute; and that is, where lands are given to a man and his heirs absolutely, without any end or limitation put to the estate^m. The second is a fee-simple determinable; which is, where land is given to a man and his heirs as long as another man, viz. *J. S.* shall have heirs of his body; there he to whom the land is given has a fee-simple, but his estate is determinable upon the death of *J. S.* without issue, for then the fee is ended. So if land be given to a man and his heirs, as long as he shall pay 20 s. annually to *A.* or as long as the church of St. Paul's shall stand, his estate is a fee-simple determinable; for in these cases the donee had the whole estate in him, and such perpetuity of an estate which may continue for ever, though at the same time there is a contingency, which when it happens will determine it, is a fee-simpleⁿ. The third is a base fee, which arises where a man makes a gift in tail, and the donee is attainted of treason; in that case the king and his heirs shall have the land as long as there are any heirs of the body of the donee. So if tenant in tail by indenture enrolled, bargain and sell the land to another and his heirs, and afterwards levy a fine to the bargainee, the bargainee has a fee in the land; but it is only to endure as long as tenant in tail has heirs of his body, and is therefore called base, as compared with the pure fee that is in the original donor, which has an absolute perpetuity belonging to it^o.

Besides these, there is another inheritance, which is called a fee-simple conditional, i. e. qualified by a condition; as an estate to a man and the heirs of his body, or to a man and the heirs male or female of his body; in which cases, if a man has not an heir of the description mentioned in the grant, the land reverts to the donor, but if he has such an heir, the land becomes, from the time of having such an heir, absolute in the donee. So that this kind of fee differs from a fee-simple determinable, inasmuch as the

^m Plowd. 557.ⁿ Ibid.^o Ibid.

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former, by performance of the condition, *i. e.* by the donee having an heir of the description named, changes its nature and becomes absolute: whereas the latter always continues in its original state, determinable whenever that fails, during the existence of which alone it is intended to continue in its original creation^p.

Since the statute *de donis*, this species of estate is confined to personal hereditaments only; real hereditaments so limited, being from that period considered as of another description, viz. as estates-tail.

All these different kinds of fee-simple estates are clearly devisable within the statutes of Henry 8; for the word fee-simple is used in the statute in its largest sense, including as well conditional or qualified as absolute fees, in opposition to estates in tail, or *pur autre vie*^q.

Fees-simple may again be considered with regard to the various relations which they have to the possession of the thing on which they attach, as lands, tenements, &c.: in which view of them they may be divided into fees-simple in possession, and fees-simple not in possession. Fees-simple are said to be in possession when no estate or interest is interposed between the right to and the possession of the thing; as where the possession is immediately in the tenant in fee-simple. Fees-simple not in possession are either where the enjoyment of them expects the accomplishment of something else that must antecede them; or where the right of estate is immediately in the party, but the possession thereof is removed or detained by another. Those circumstanced in the latter predicament, we have seen, are not devisable within these statutes^r. Fees-simple in the former predicaments are of several kinds; as first, reversions. A reversion, though a present interest, yet stands in a degree removed from the possession, till the particular estate that precedes it is determined. Secondly,

^p 2 Blackst. Com. 110.

^r *Supra*, sec. iv.

^q *Per Coke et Dodderidge*,

3 Bulst. 184.

remainders. A remainder stands in a similar predicament. A reversion differs from a remainder inasmuch as a reversion is that which is left in a man who creates a particular estate, and a remainder is that which passes from a man at the time of a particular estate made, and is created together with such particular estate^a. Thirdly, contingent interests, or interests and estates limited to take place upon a precedent condition; which occur in cases of accruals of rights upon events dubious and uncertain. Of this description are executory devises, estates to be enlarged upon condition, other conditional limitations and uncertain interests reducible to no general head, contingent remainders and future uses^b. Fourthly, estates subject to a condition of re-entry, wherein he that has the benefit of the condition, though he has an estate in the condition, yet he has not the land until the condition broken and a re-entry. Any of these estates or interests in things devisable themselves, except those comprised under the last mentioned, may be devisable by the owner, altogether or in part^c.

Thus, although it was contended, in *Leonard Lovie's* case, that a reversion was fruitless, and not of any yearly value as long as an estate-tail that preceded it continued, and therefore that it was not within the statutes of wills, but fell under the distinction taken as to things not valuable; it was resolved, that there was a difference between hereditaments, which of their nature were not of any annual value, and things which, in their nature, were of an annual value, but in respect of a gift or lease, *absque aliquo inde reddendo*, were not of present value as in the principal case; for, although the reversion *in presenti* was not of any annual value; yet the land itself was of an annual value; and that therefore such reversion was devisable^d. So it was held in

^a Plowd. 154; Vaugh. 269.

^b Fearne's Contin. Rem. 1;
7 Ves. jun. 300.

^c See *Cowper v. Franklin*,
3 Bulst. 184.

^d *Leonard Lovie's* case, 10
Co. 78, a; and see *Sir Lit-
ton Strode v. Lady Faulk-
land*, 2 Vern. 621.

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Beddingfield's case, that a reversion in fee expectant on an estate-tail, seck and fruitless, was within the statute of 34th Hen. 8^v. And a remainder vested, expectant of an estate-tail, was also devisable within the custom of devising, and is within the reason of *Beddingfield's* case and *Lovie's* case, in respect of the statutes of wills².

But the grantor of an estate subject to a condition of re-entry, cannot devise it, because the grantor, though he has the benefit of the condition vested in him, yet has not the land until the condition broken⁷. And the devisee over cannot take advantage of the breach merely as such; for the benefit thereof is not devisable, but must go in privity to the heir at law of the grantor, who must enter for it.

Estates in fee-simple are either legal or equitable. Equitable estates are where trustees are interposed for the purpose of effectuating particular objects of the creator of such estates; the estate of *cestui que trust* in such cases was formerly styled an use. We have already seen, that uses were the medium through which devises were rendered universal previous to the statute of the 27th Hen. 8, which, by transferring the possession to the use, converted them into legal estates; it is only necessary here to observe, that such uses or trusts as have been since retained in equity, not only as partaking of the original nature of an use, but also as hereditaments, still continue devisable.

A trust estate suspended may also be devised². Thus, if feoffees to uses before the statute of the 27th Hen. 8, had been disseised, by which disseisin the use would have been suspended, and afterwards, during the disseisin, *cestui que use* had, by his will, devised that his feoffees should re-enter, and then make an estate to J. S. in fee; this would have been a good devise; for, by that disseisin the

^v *Beddingfield's* case, cited 10 Co. 81, b; and *Winsmore v. Hobert*, Hob. 313.

² 1 Rol. Abr. 609, F. pl. 2, 27; Co. Lit. 111.

⁷ See 1 Ves. 223, 422.

² 1 Leon. 257, per Wray.

trust and confidence reposed in the feoffees was not suspended, though the estate was.

So a devise of an use before the 27th Henry 8, by one seised with seven others, unto the use of himself and his heirs, was held good by the court unanimously; and yet the use was in part suspended, because he was jointly seised with seven others to his own use, and to the use for the eighth part suspended^a. For when the devise was to take effect, viz. at the time of the death of the testator, all the possession of the land by the survivor, passed from the use, and then the use, being withdrawn from the possession, would pass.

It was formerly held, that contingent interests in lands, resting merely in possibility, were incapable of being passed by a will made previous to their vesting^b.

But the law is clearly now held to be otherwise^c, the old authorities having been overruled impliedly in the case of *Selwyn v. Selwyn*, and positively in the case of *Moor and Wife v. Hawkins*^d. And in the case of *Roe on the demise of Perry v. Jones*^e, the Court of Common Pleas, taking the interest there in question on a devise to be a springing, contingent, executory use, were unanimously of opinion, that it was devisable and passed by the will.

But an estate that is turned to a right, as a reversion discontinued, is not within the purview of these statutes; for then the deviser having nothing in the reversion but only a right, the devise was void.

A freehold, descendible *pur auter vie*, also is not devisable by the statutes of wills; for those statutes are confined to persons having manors, lands, tenements or

^a *Manning v. Andrews*,
1 Leon. 256.

^b *Bishop v. Fountaine*, 3
Lev. 427; *Fearne's Conting.*
Rem. 291.

^c *Selwyn v. Selwyn*, 1
Blac. 222; 7 Ves. jun. 300.

^d *Moor v. Hawkins*, cited
1 H. Blac. 33.

^e *Roe on dem. Perry v.*
Jones, Ib. 30-34.

^f *Baker v. Hacking*, Cro.
Car. 387, 405.

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hereditaments of inheritance in fee-simple^z. From which it is plain, that the legislature had not this kind of estate in contemplation; for he that has a descendible freehold has not an estate in fee-simple.

Upon the same principle, an estate to one *pur autre vie*, is not devisable under these statutes. Thus, if tenant by curtesy grant over his estate, and the grantee deviseth it and dieth; this is a void devise, and out of the statutes of wills^b. But it is now enacted, by the 29th Car. 2, c. 3, s. 12, that estates *pur autre vie*, may be devised by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, and attested and subscribed in the presence of the devisor, and three or more witnesses.

But where the land was devisable by custom, he who had such an estate might devise it; the reason of this distinction between devises by the custom and devises by the statute, is, that the custom is general, "that every one seised of lands may devise;" whereas the statutes are confined to manors, lands, &c. holden in fee-simple; the former of which description is applicable to this kind of estate; but the latter is not so applicable¹. And as the statutes of wills were held, on construction, not to extend to lands devisable by custom, so it seems doubtful whether the stat. 29th Car. 2, c. 3, s. 12, extends to estates *pur autre vie*, devisable by custom; and if it do not, the consequence will be, that a parol will, or where the custom requires writing, a written will, though not executed according to this clause in the statute, will be sufficient to convey such interest; *sed quare*.

This kind of interest *pur autre vie*, may be entailed, and admits of a limitation over by way of remainder^k; because

^z Carter, 311; Poph. 91;
34 & 35 Hen. 8, c. 1.

^b *Delaper's case*, cited
Cro. Eliz. 58; Co. Lit. 41;
Verney v. Verney, 1 Ves. 428.

¹ 33 Eliz. 3, tit. Dev. 21,
cited Cro. Eliz. 805.

^k *Low v. Burron*, 3 Will.
262.

such a limitation of an estate *pur auter vie*, does not carry a conditional fee at common law, which could only be created out of an estate of inheritance, and the estate out of which such limitation issues, is but an estate *pur auter vie*; and therefore if such an estate *pur auter vie*, or for lives, be limited to one for life, remainder to her issue male, and for want of such issue, remainder over to *B.* the remainder to *B.* will be good on *A.*'s death without issue; for these limitations take effect as a description who shall take as special occupants during the life of *cestui que vie*, and so the latter differs from a possibility after a conditional fee, which could not be limited over at common law. It is the same, therefore, as if the grantor, instead of describing a wandering right of general occupancy, had said, "I do appoint that, after the death of *A.* the grantee, they who shall happen to be heirs of the body of *A.* shall be special occupants of the premises, and if there should be no issue of the body of *A.* then *B.* and his heirs shall be special occupants thereof." But it is observable, that *A.* may, by any conveyance, or even by articles in equity, bar his own heirs and those in remainder¹. And it seems that *A.* has not, in this case, such an interest in the estate *pur auter vie*, as he can devise, by virtue of the statute 29th Car. 2, c. 3, or by custom, without first levying a fine, or doing some act to bar those in expectancy; for his heirs, claiming at common law as special occupants favouring of the nature of tenant in tail, take in their own right, as it were *per formam doni*, and not merely as special occupants by descent from *A.*^m.

A mere claim in equity to an interest in the trust of an hereditament is devisableⁿ. Equitable interests.

¹ *Norton v. Frecker*, 1 Atk. 525; *Baker v. Bailey*, 2 Vern. 225. *of Grafton v. Hanmer*, Ibid. 266, n. E; *Baker v. Bailey*, 2 Vern. 225; *Finch v. Tucker*, Ibid. 184.

^m See *Salton v. Salton*, 2 Atk. 376; *Blake v. Blake*, 3 P. Wms. 10, n. (1); *Duke* ⁿ *Cornbury v. Middleton*, 1 Ch. Ca. 173, 208.

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A further requisite is, that the devisor be seised either legally or equitably of the lands, &c. devised at the time of the devise; for if a devise of land is to be considered as an immediate conveyance or gift of the land to the devisee (and its being so is the reason why the devisee, as will be shown hereafter, may take the lands, &c. devised without the consent of the heir or executor), this mode of construction upon the operation of it, seems consonant to the construction upon the operation of every other species of conveyance by which real property may be passed by our law°. Thus, by the policy of the feudal system, the principles of which do certainly in a greater or less degree pervade our whole system of law respecting freehold property in lands or tenements, some notorious act was required to attend every direct change which happened in the proprietorship thereof, in order that those who were interested might know who was the real owner. With this view, that law required on every alienation of lands by feoffment, the solemnity of livery of seisin, which might be by livery in deed, or livery in law. In both cases the process was symbolical, and necessarily imported an actual ownership in the thing aliened at the moment of alienation, because no one can deliver, unless he be first in possession of that which is to be delivered. And though a variety of other conveyances, by which property in land may be disposed of, have been invented, the grand objects of which are to elude and dispense with this solemnity of livery, yet it is observable, that in every one of them, the principle upon which that ceremony is dispensed with is, that the fact in whom the possession rests is notorious already, and that, therefore, no other act is necessary to make it more so; so that these conveyances, as well as the common law conveyance of feoffment, do not warrant any alienation or disposition of lands, which the person has not, or has no right or interest in, at the time

° Co. Lit. 111, a.

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of making or executing such conveyance; and, therefore, it is said, (1 Inst. 265,) that the words generally inserted in releases, as to all rights the releasor shall or can have for the future, are void; for no right passes by a release but the right which the party has at the time of the release made, though it be released in express words which show the intent of the party. The law, indeed, in the case of a devise, dispenses with the solemnity of livery, and with the interposition of those forms which were substituted in the room of it, and allows lands to pass immediately by a devise, without the ceremony of livery of seisin, either in law or fact. The dispensing with these solemnities was necessarily incidental to the nature of the conveyance we are treating upon, and analogous to the indulgence it met with in many other respects; the law presumes that a devise is made *in extremis*, frequently it is done in *articulo mortis*; it would therefore have been repugnant to the very nature of the instrument to have required either the ceremony of livery of seisin, or any substitute for it, in a case where, from the nature of the occasion which required the execution of the instrument, no opportunity could be supposed to occur for carrying it into effect. Upon this occasion, therefore, the law had regard only to the state of mind of the devisor, and to the formalities that related to the instrument itself, the property in this case being considered as passing by the instrument, and not as on a feoffment, by the livery of which the deed was only an evidence (1).

So on a similar principle, that land, of which the devisee was not seised at the time of making his will, will pass by a devise; it has been holden, that mortgaged estates, of which the equity of redemption had been purchased in

(1) See arguments and cases upon these points, Pow. Dev. 186, 195; Gilb. Dev. 126, 238.

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after the mortgagee had made his will, did not pass^p, because, until the equity of redemption purchased in, they were, in equity, only securities for money, and part of the mortgagee's personal estate; and when the equity of redemption was afterwards purchased in, they were then as new acquisitions, new purchases in fee, and, as such, would not pass by a will made previous to the acquiring them.

But if a man has an equitable estate in lands at the time of making his will, a devise of them will be good. Thus where, on a treaty of purchase, articles were entered into between *A.* and *P.* by which *P.* agreed to convey to *A.* lands called *R.* in fee; and *A.* made his will in writing, and devised, in general words, "all his lands to be sold for payment of his debts and legacies;" the devise was held to be good, though it was general, and the deviser was not seised at the time of the will made, and there was no new publication of the will. And though a stress, in this case, appears to have been laid on the circumstance of the devise being for payment of debts, yet such devise will be equally effectual although it be a beneficial devise, and not for payment of debts^q. Thus, where *D.* agreed for the purchase of certain copyhold lands, which were surrendered out of court to his use, but before admittance he died, having other copyholds, and having made his will after the said contract, and devised to the plaintiff, who was then and at his death his visible heir, all his copyholds^r; it was declared by the court, upon the hearing, that it was clear the said copyholds, so agreed for, did pass by the will to the plaintiff; for that the purchaser had an equity to recover the land, and the vendor stood

^p *Strode v. Faulkland*, 3 Ch. Ca. 144; and see 1 Bro. Ch. Ca. Rep. 99; and see Ch. Ca. 226.
^q *Co. Lit.* 203, n. 96; 3 Ves. jun. 348.
^r *Prideaux v. Gibbon*, 2 Ch. Ca. 39; *Acherley v. Vernon*, 9 Mod. 78.

trustee for the purchaser, or whom he should appoint, till a conveyance executed.

And the devise of such equitable interest in land will be good, although by express stipulation the agreement be not to be carried into execution until a future day, which occurs not until after the time at which the will bears date^{*}; for that the lands are bound immediately from the execution of the articles, and the possession not being to be delivered till a future time, makes no difference in equity.

And such estate, so contracted for, will pass by any general or sweeping words in a will[†]; as "all my messuages, lands, tenements and hereditaments in the county of B. or elsewhere in any part of England: upon which words, a question arising whether the lands contracted for would pass, Sir John Strange, Master of the Rolls, was clearly of opinion, that such general words would carry any estate to which the testator was entitled, either in law or equity, at the time of the devise made. And the court was of opinion, that any contract which a court of equity would enforce on an application for a specific performance, was sufficient to vest such an estate in the purchaser, in equity, as might be devised by a will made previous to such contract being carried into execution.

But, if lands be not articted for at the time of the will made, they will not pass in equity any more than at law. Thus, where L. by attorney, entered into articles with P. for the sale of lands[‡], the articles were dated November 1725, and thereby L. agreed to convey certain lands to P. and his heirs on or before the Lady-day then next following; P. lived until after Lady-day, but in 1722, long before the executing these articles, made his will, by which he devised all his real estate to his son R. P. for

^{*} *Greenhill v. Greenhill*, Prec. Cha. 320; 2 Vern. 79; 437; *et vide* Ibid. 494.
[†] *Potter v. Potter*, 1 Ves. 437; *et vide* Ibid. 494.
[‡] 2 P. Wms. 631. [§] *Langford v. Pitt*, 2 P. Wms. 629.

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life, &c. And on a question, whether the lands articted to be purchased, passed by the will, the Master of the Rolls was clearly of opinion, that they did not; and said that there was a material difference between this case and that of *Greenhill v. Greenhill*; in the case of *Greenhill v. Greenhill*, the articles for the purchase were entered into by the testator before he made his will, and so the equitable interest which he gained thereby was well devisable; but, in the present case, *P.*'s will was made prior to the articles for this purchase, which was before he had any equitable interest in the lands; consequently, when he had no kind of title he could devise nothing: therefore this interest in the lands gained by *P.*'s articles descended to his son *R. P.* as heir at law.

An estate holden in joint-tenancy cannot be made the subject of a devise*. If, therefore, there be two joint-tenants of lands in fee-simple, within a borough where lands and tenements are devisable by testament, and if one of the two joint-tenants devise that which belongs to him, and die, this devise is void, because no devise can take effect till after the death of the devisor, and by his death, all the land presently comes by law to his companion who survives, by the survivorship; for he does not claim nor is entitled to the estate by the deceased joint-tenant, but by a title paramount. And, therefore, although his title and that of the devisee commence at one and the same instant, and although an instant (according to its common signification) is an indivisible time, and, as it is well expressed, the ending of one time and the beginning of another, yet, in consideration of law, and for the purposes of justice, there is priority of time in an instant; and therefore, in this case, the survivor is preferred to the devisee; for, as Littleton expresses it, the former claims *by* the death, and the latter *after* the death; and therefore, although the titles commence at one instant, yet the law

* Lit. s. 287; Co. Lit. 185, a, b.

allows priority of time in that instant, which Littleton distinguishes by *per* and *post*. And, although joint-tenants are not mentioned in the statute 32 Hen. 8, nor expressly excepted in 34 Hen. 8, yet they are thereby *tacitly* precluded from devising, not only by not being therein expressly empowered, as tenants in coparcenary and common are, but by the power of devising being confined to persons *sole* seised.

And although the joint-tenancy be severed at the time of the devisor's death, or if he survive his companions, yet if the will be made prior to those events, it will be void. Thus, where a joint-tenant devised his part of the estate, held in jointure with his sister, to one J. G. and then, by lease and release, made to A. B. to the use of himself in fee, severed the joint-tenancy, and died without revoking or republishing his will^{*}; the court held the devise void, and said there was no difficulty in this case. The will was of an estate held by the devisor jointly with his sister. The only question was, whether the will was not void *ab initio*. The devisor had nothing devisable. If the will of a joint-tenant could operate at all, it must be by severance of the jointure; but that it could not do, because the doctrine of survivorship took place before the will could operate. And the court denied the doctrine laid down in Perkins[†], that if such devisor survive all his companions, then such devise, previously made, would be good; and held, that such a will would be void both at common law and upon the statute. And Mr. Justice Wilmot said, that the time of making the will, was the material time in this case, as well with regard to the quality of the estate, as to the personal ability of the testator; for, by the express words of the 34 and 35 Hen. 8, he must have the estate, in order to be capable of devising it. Now this man, who only held in jointure at the time when he made his will, had not a devisable estate when

^{*} *Swift on dem. Neale v. S. C. 3 Burr. 1488.*
Roberts, 1 Blac. Rep. 476; † Sec. 500.

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he made the devise; which it was necessary he should have had, at the time of devising, in order to make the devise good^{*}.

And though the joint-tenancy be avoided by an incident which has relation, as to some purposes, to the original commencement of that tenure, and operates to avoid it *ab initio*; yet, such relation will not give efficacy to a will made, when, in consideration of law, the tenure was joint. Thus where *A.* seised in his demesne as of a fee of a manor of *H.* holden of the king by knight's service *in capite*, after the marriage of *W.* his son, with *E.* in consideration of that marriage, and for the jointure of *E.* assured the manor of *H.* to the use of *W.* and *E.* in tail, and died^{*}. By the death of *A.* the reversion of the said manor of *H.* descended likewise to *W.*—*A.* was also seised of the manor of *T.* in his demesne as of fee, holden also of the queen by knight's service in chief, and also of certain lands in *F.* which lands in *F.* with the manor of *H.* were the full third part value of all the lands belonging to *W.*—*W.* by his will, devised to *E.* his manor of *T.* for her life, in satisfaction of her jointure and dower, upon condition, that if she took to any other jointure, then the devise to her should be void; and, after her decease, he devised the same over in tail male, with remainder to the right heirs of the devisor. Then *W.* died, leaving a son, and *G.* a daughter. After the death of *W.* *E.* his wife waived her estate in *H.* as was lawful for her to do by virtue of the statute 27 Hen. 8, c. 10, the jointure thereupon being made after marriage. And then a question arose between *G.* the daughter of *W.* and a claimant under the will of *W.* whether this devise was not void under the statute of Hen. 8, the devisor not having left a third part of the lands he held by knight's service in fee to descend to his heir? The decision of this question depended upon

^{*} *Swift* on dem. *Neale v. Roberts*, 1 Blac. Rep. 476; S. C. 3 Burr. 1488.

^{*} *Butler v. Baker*, Poph. 87; S. C. 3 Co. 31, a; 1 And. 348; Moore, 254.

another question, viz. whether, by the waiver of *E.* the inheritance in *H.* of which, during the life of *W.* she and her husband were joint-tenants, could then be said to have been wholly in the husband *W. ab initio*? for, if that position could be supported, that manor, together with *F.* being a third of the whole land, and, in consequence of the waiver, being left to descend to the heir of the devisor, the will, as to the manor of *T.* which amounted only to two-thirds of the devisor's lands, was good for the whole thereof, and, consequently, the daughter had no claim to any part of it. And as to this point, the Court of King's Bench were divided, Wray and Gawdy being of opinion that the will was void, and Clench and Fennor holding the contrary; whereupon it was adjourned into the Exchequer Chamber; and there Periam, Chief Baron, Clench, Clark, Wahmsley and Fennor were of opinion, that the devisor, by reason of the waiver, should be sole seised *ab initio*. But Popham and Anderson, Chief Justices, and the other Justices and Barons, held the contrary, and that judgment ought to be given against his devise; and that, by the very letter and purport of the statutes of 32 and 34 Hen. 8; for, they said, they were to consider what estate the devisor had in the land at the time of the devise made, without regard to that which might happen by matter *ex post facto* upon the deed of another; that if it had been demanded of any appraised by the law, at the time when the will was made, what estate the devisor then had in the manor of *H.* none was so unlearned to say that he had any other estate in it than jointly with his wife; and, if so, it followed that this manor was then out of the letter and intent of the law, for he was not then sole seised thereof, nor seised in coparcenary nor in common; and by the words of the statute he should be sole seised in fee-simple, or seised in fee-simple in coparcenary, or in common. It appeared that the intent of the statute was, that he should have full power of himself, without the

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means or aid of another to dispose of the land of which he was by the statute to make disposition, or to leave it to his heir, and this he had not for the manor of *H.* And further, that the words of 32 Hen. 8, were, that the deviser had full power at his will and pleasure to devise two parts of his land so holden; which was to be intended of such land of which he then had full power to make disposition, and this he could not then do for the manor of *H.* and therefore judgment was given against the devisee.

VI. WHAT ESTATE OR INTEREST MAY BE CREATED BY DEVISE, AND BY WHAT WORDS.

THE next head of inquiry is, what estates may be devised by persons having any estates or interests in things devisable by virtue of the statutes or by custom.

Fee-simple.

First, it is plain, that a person having a fee-simple absolute in any lands devisable, either by custom or the statutes, may devise a similar estate to another. And a fee-simple absolute, being of greater extent and latitude than any other fee-simple, it follows of course that any other fee-simple less than a fee-simple absolute, that can be created by act of the party, and does not arise by act of law only, may be created by devise. Thus, one having a fee-simple absolute in possession or in reversion, or remainder in an hereditament, may devise a fee-simple conditional therein, if the subject on which it is to attach be not within the statute *de donis*, as a devise of an annuity to one, and the heirs of his body, &c.

Determinable fee.

So, likewise, a determinable fee may, by devise, be carved out of a fee-simple absolute. As, where one devised that his eldest son, with his executors, should take the profits of his lands until his youngest son should come to the age of twenty-two years, and then that the younger son should have the lands to him and the heirs of his body. It was the clear opinion of all the Justices, that the eldest

son had a fee-simple in the lands until the younger son came to the age of twenty-two^b.

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One having a fee-simple absolute in lands or tenements in possession, reversion or remainder, may also, by devise, create a fee-tail; as, if he devise his lands to one, and the heirs of his body. Fee-tail.

But a fee to take place after a fee, whether the latter be absolute, conditional or determinable, cannot be created by devise^c; because either of these fees exhausts all the interest or estate which the law considers as vested in the person of the devisor in any hereditament devised, and conveys to the devisee the whole estate. And therefore no reversion expectant is left in the devisor, out of which a remainder expectant, in the strict sense of the word, may be limited; for, when all the estate a man has is given away, nothing can remain: and a fee-simple contains all the estate a man can have in him, and consequently, after he has limited that, no other or further estate remains in him to dispose of^d. Therefore, if one devise land to *A.* in fee, and if he die without heir, that *B.* shall have the land, this devise to *B.* is void; for that one fee-simple cannot depend upon another fee-simple by the rule of law.

And the rule of law is the same as to a fee-simple conditional. Thus it was held by Lord Hardwicke, in the case of *Stafford v. Bulkley*^e, that where a personal annuity, having no relation to lands and tenements, nor partaking of the nature of rent, was directed to be settled to one for life, and the heirs of her body, that the limitation must be of a fee-simple conditional, and that consequently no remainder could be limited over thereupon; for no remainder

^b *Gates v. Holywell*, 3 Leon. 216.

^c *Hearn v. Allen*, Cro. Car. 57; 10 Rep. 97, 98; 1 Salk. 231.

^d *Sed vide infra*, as to ex-

ecutory devises, which, in some degree, are evasions of this rule of law.

^e *Stafford v. Bulkley*, 2 Ves. 180; *Turner v. Turner*, Brown's Rep. Cha. 326.

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could be created of any such estate not within the statute *de donis*; for before that statute, it was but a possibility of a reverter, out of which a remainder could not be limited; upon this notion, that, being upon a possibility, it could not be grantable over; and if, before the statute *de donis*, a man had granted lands to another, and the heirs of his body, and said, in default of such issue to *B.* and his heirs, that grant over had been void.

But the statute *de donis* altered the nature of these conditional fees, when applied to real hereditaments; the construction of that statute being, that the donee or devisee has no longer a conditional fee-simple, but that, by the statute, the estate is divided into two parts, leaving in the donee or his alienee a particular kind of estate, denominated a fee-tail, and vesting in the donor the ultimate fee-simple of the land expectant on the failure of issue, which expectant estate takes effect as a reversion or remainder. Therefore, if one, having lands, tenements or hereditaments, savouring of the realty, in fee-simple, devise the same to *A.* for life, remainder to *B.* in tail, remainder to *C.* in fee, this devise of the remainder in fee will take effect out of the reversion expectant on the determination of the fee-tail, and will be valid although an estate in fee-tail precede it¹.

And one having a fee may devise an estate less than a fee, as an estate to one for his own life, or for the life of another. And the devisee thereof may, by virtue of such devise, immediately upon the death of the deviser, enter upon the thing devised.

If a devise be of an estate for life only, the reversion will descend to the heirs of the deviser, and vest in them.

But a tenant in fee-simple having, after such devise for life or in tail, a further estate remaining in himself, part of the fee-simple, may proceed further, and devise other estates, to take effect upon the expiration of such estate for life or in tail, until he has exhausted his whole fee.

¹ 1 Rol. Abr. 609, F. pl. 2; Co. Lit. 111.

But a doubt was formerly entertained,^s whether, when the devise itself created a thing *de novo*, and was not the disposition of a thing already in being, a remainder thereof could be limited to take effect after an estate, less than a fee, disposed of thereby in such new-created thing; and therefore it was held, that if a man devised a rent-charge for term of life, he could not thereupon graft a remainder in fee of the same rent; the reason of which was, that the rent being a new thing, there was no fee-simple of it in the grantor, consequently he had no reversion in him, after the estate for life, out of which the remainder could take effect^s. But this opinion was shown to be fallacious, and overturned upon a full consideration thereof, in the case of *Smith v. Farnaby*, the judgment in which was affirmed in error; for such a devise is not in law considered as the disposition of a remainder, but as a limitation of the estate meant to be given in the thing created *de novo*, and the whole operates as an entire estate. In the case alluded to, A. seised of lands in fee, devised them to his son and his heirs, and devised a rent of 50*l.* per annum, going out of them to another son, and that, if that son should die without heirs male of his body, then the rent should remain over to another and his heirs male. And one question made thereupon was, whether a rent, created *de novo* by grant or devise, might be limited by way of remainder? And it was held that it might; for, that this was all but one estate, being by one conveyance, in like manner as if it had been to J. S. and his heirs^b.

The most apt and proper word to create a remainder, is the word *remainder* itself¹.

To make a good remainder, there must be a particular estate precedent, and that must be created at the same

^s Plowd. Com. 35; M. 15 52; S.C. 1 Sid. 285; *Collingbroke's* case, Bro. Abr. 19, E. 4, 9, a; and see 1 Hen. Blac. 33; 3 Durnf. & East, pl. 26; *Cromwell's* case, 2 88, 93; 1 Ves. jun. 254. Co. 69.

¹ *Smith v. Farnaby*, Carter,

¹ Plowd. 134, 159, 170.

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time when the remainder is made, as a foundation to bear it up^{*}. This particular estate must continue till the remainder vests. There must be a remnant of the estate in the lessor to grant after the particular estate granted. The remainder must pass out of the donor presently to him in remainder, or else it must be in custody of law in abeyance. It must vest in estate either presently during the particular estate, or *eo instanti* when it doth end, not afterwards. There must be also a person capable of it at the time of the creation of the estate, or at least one that, by common and ordinary possibility, may be capable at the time when the remainder doth happen; and if it be to fall on a possibility, it must be such a possibility as is near, common and ordinary, as death without issue, coverture, &c. and not remote, as entry into religion, &c.

And a term *de novo* in lands may be created by devise. As, where one "gave, granted, willed and bequeathed his lands to his son Thomas, and to the heirs male of his body lawfully begotten, from and after his death, for and during the term of five hundred years then next ensuing, fully to be complete and ended¹." By such a devise, the devisee has an estate for five hundred years, so long as he has issue of his body.

And the limitation, in the preceding case, being during the term of five hundred years, the term will determine whenever there shall be a failure of issue male.

But if one seised in fee devise to *B.* his executors and administrators, for ninety-nine years, in trust for himself and his wife for their lives and the life of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies, and in default of such issue, then in trust for the heirs of his own body, and in default of such issue, in trust for the heirs of the survivor of the husband and wife, and the husband die without issue, living the

^{*} Plow. 34, 136, 155, 190;
10 Co. 97, 320; Co. Lit.
378.

¹ *Lovie's case*, 10 Co. 78.

wife; the trust of this term will be vested in the wife for the remainder of the ninety-nine years, notwithstanding the failure of issue, and it will not descend to the heir at law of A. who was entitled to the reversion in fee expectant on the term, as a term attendant on the reversion^m.

The foundation of the distinction made between the former and the latter of the two preceding cases seems to be, that in the former case the word "term" is understood in its technical sense; that is, not merely as signifying the time specified, but also the estate and interest that passes by the lease: and the estate and interest that passes by such lease is an estate to his son Thomas, and the heirs of his body, which estate may determine for want of a person to hold it, (viz. an heir of Thomas's body) within the time of five hundred years; in which case the term, which was to be governed by the continuation of heirs of the body, will cease; but in the latter case, the limitation, specifying the time only of continuance, and limiting the trust, in case of failure of issue, to the survivor of the donee and his wife, and the heirs general of the survivor, though a void limitation, yet is sufficient to show the intention of the donor, that the term should not determine until the time limited elapseⁿ.

Estates limited by devise, either by virtue of the statutes of wills, or the custom of devising, may moreover be either absolute or conditional. First, under the statutes: as, where one gives his lands to his wife for term of her life, upon condition that she shall find Jasper, her eldest son, at school, and educate him in virtue and good morals at her cost until he shall arrive at twenty-one^o. Such condition may be annexed to an estate given by will under the statutes 32 and 34 Hen. 8, they giving power to the devisor to make devises "at his free will and pleasure^p."

Absolute and conditional estates.

^m *Hayler v. Rod*, 1 P. Wms. 360.

ⁿ *Sed quære*.

^o *Dyer*, 126, b, pl. 51.

^p And see *Gulliver v. Ashby*, infra; and *Ruddall v. Milward*, Saville, 66.

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Secondly, under the custom: as, where a devise was, that the executors of the devisor of lands devisable by custom, should sell the land; here a condition arose by implication, and if they omitted to sell, the heir might enter for breach thereof¹. So, where one devised certain houses in London to *A.* and *B.* in fee, to hold in common, upon condition that they and their heirs should pay an annual rent, issuing out of the said tenements, at the days and times therein mentioned, to the wife of the devisor during her life, &c.; the rent being in arrear, and no demand made by the wife, the heir entered for breach of the condition, and his entry was held good².

And conditions in wills may be either precedent or subsequent. But there are no technical words to distinguish conditions precedent or subsequent; but the same words may indifferently make either, according to the intent of the person who creates the condition³. Thus, a condition describing the qualification of a person who is to take, is in its nature a condition precedent: as, a devise of 200*l.* to *A.* provided she continue with the testator's executors until she attain twenty-one; but if *A.* should be taken from them by her father before she attain twenty-one, or marry against their consent, then she to have but 10*l.* Here if *A.* marry without consent, she shall not have the legacy of 200*l.* but only the 10*l.* for the marriage with consent is a condition precedent⁴. So, where one devised lands to trustees and their heirs, in trust to pay such of his debts and legacies as his personal estate should fall short to pay, and then in trust for his niece *E.* his heir at law, for her life, in case she, within three years after his death, should be married to *D.* remainder to her first and other sons by *D.* in tail male, &c.; this was held, to be a condition precedent; for, by the will, three years profits, after the death of the testator, were to be applied to

¹ Dyer, 126.

² Ibid. 348, pl. 13.

³ Rep. temp. Talbot, 164.

⁴ *Creagh v. Wilson*, 2 Vern. 573.

pay the debts, so nothing descended in the mean time, or vested^a.

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But where one devised all his lands unto *A.* and his heirs, to the use of *B.* and his heirs, for payment of his debts, and afterwards in trust for *C.* and the heirs of her body, remainder to *D.* and his right heirs, upon condition that he should marry *C.* the condition was held to be subsequent; for the precedent limitation was an estate-tail in possession, and there was no reason to conclude but that, as to the remainder likewise, it was the testator's intent to have it vest immediately in *D.* The limitation was immediate, although the condition on which it depended was subsequent^a. So, if one devise his real estate to *A.* and his heirs, upon express condition, that within three months after his decease, he shall execute and deliver to *B.* a general release of all demands which he may claim of his estate, or any part thereof, for what cause soever; this will operate as a condition subsequent, and the estate will vest in *A.* to be defeated or not, according to what happens afterwards^b.

Estates in hereditaments, created by devise, may be either vested or contingent. An estate vested, is where there is an immediate right of present or future enjoyment, in which view of them, estates are either vested in interest or in possession^c. Where there is a right of present enjoyment, the estate is said to vest in possession. As, if a devise be to *A.* for life, remainder to *B.* in tail; *A.* dies; *B.*'s estate immediately vests in possession^d. But where there is only a present fixed right of future enjoyment, an estate is said to vest in interest. As, if a devise be to *A.* for life, remainder to *B.* in tail, here *B.*'s estate, from the very instant of its limitation, is capable of taking effect

Vested and contingent estates.

^a *Bertie v. Falkland*, 2 Vern. 340.

^b *John Robinson v. Comyns*, Rep. temp. Talbot, 165.

^c See *Avelyn v. Ward*, 1 Ves. 420.

^d *Fearne Cont. Rem.* 1.

^e *Ibid.*

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in possession, and *B.* has a right to enjoy it if the possession fall by the death of *A.* But until that event happens, *B.* has no right to the possession: until then, therefore, it is vested in interest only^b. And such an estate vested in interest, may be either absolutely vested, or vested in suspense; as, if a remainder be limited in trust for such child or children of *T. M.* on the body of *J. S.* lawfully to be begotten, in such manner, &c. as *T. M.* and *J. S.* shall by deed, &c. appoint, and for want of such appointment, then, &c. to all and every the children, &c. share and share alike. This remainder vests in interest in suspense, until the father's death, in such children as come *in esse*, liable to be varied as to the quantum of the proportions as they arise, and subject to be divested by appointment^c.

A contingent estate, as we have before mentioned, is where a right is to accrue upon an event which is dubious and uncertain^d.

We have seen that, from the nature of the interest in lands, tenements and hereditaments, recognized by the municipal laws of this country, no remainder can be limited to take effect after or rest upon any estate in fee-simple; because a fee-simple exhausting all the interest that a donor has, when the whole is granted there can be no remainder. But although the law will not recognize a remainder to take effect after the expiration of a fee, yet, by way of indulgence to a man's last will and testament, and in favour of the intention of devisors, where otherwise the words of a will would be void, it permits, under certain restrictions, a fee or other estate to be substituted as an alternative, in the place of a fee before limited, provided the substitution be to take effect within a reasonable period of time. Devises of this nature are called executory,

^b Fearne Cont. Rem. 1.

^c See 2 Ves. 118.

^d Fearne Cont. Rem. 2.

^e 10 Rep. 95; 1 Inst. 18; Dyer, 33.

because the estates thereby limited to take place, by way of substitution, have no present existence in consideration of law, but merely a capacity of existence, and of being executed, *i. e.* taking effect when the contingency upon which they are limited occurs^f. Thus, a devise of lands to a man's wife for life, remainder to *C.* his second son, in fee; provided, that if *D.* his third son, should, within three months after the wife's death, pay 500*l.* to *C.* his executors, &c. then the lands to go to *D.* and his heirs, is good as an executory devise^g. So it is if *A.* devise to *B.* his son and his heirs for ever, and if he die without issue, living *A.* then *C.* to have those lands to him and his heirs for ever^h. In the former case, *C.* took a vested fee-simple; and the limitation to *D.* was good as an executory devise, to take effect if *D.* paid the 500*l.* within the time limited. And, in the latter case, *B.* took a vested fee-simple; and the limitation over to *C.* was an executory devise, to take effect on *B.*'s dying without issue in the life-time of *A.*

If there be a particular estate with a remainder so limited, the happening of the condition will not destroy the particular estate. As, if *A.* devise land to *B.* for life, remainder to *C.* in fee; provided, that if *A.*'s wife, being *enseint*, should be delivered of a son, then the lands shall remain to him in fee; and *A.* die, and a son be born. In such case, this proviso will not destroy the estate of *B.* but of *C.* onlyⁱ.

It is necessary, in considering these cases, to observe the distinction between the words, "and if he die without issue," (used with reference to the first devisee) standing alone, and the words "if he die without issue, living *A.*" or the like, or, "before *A.* arrive at twenty-one years of age," &c. so used; for the former words operate only as

^f Cro. Jac. 592.

590; 1 Eq. Ca. Abr. 187;

^g *Marks v. Marks*, 10 Mod. S. C. 2 Rol. Rep. 216.

420; S. C. *Strange*, 129.

^h *Dyer*, 127, a.

ⁱ *Pell v. Brown*, Cro. Jac.

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an explanation of the testator's intent who shall succeed, namely, issue of his body; and whensoever the devisee dies without issue, the land will remain over. But the latter words qualify the preceding estates with a collateral determination, give effect to a conditional limitation to another, if such an event happen, and operate as a complete defeasance of the first fee upon that event, but by no means tend, independent of such event, to abridge or narrow the extent of the estate first limited, or to reduce it from a fee-simple to an estate-tail; because the latter clause, "if he die without issue," is not absolute and indefinite, whensoever he die without issue, but it is with a contingency, "if he die without issue, living *A.*" or "before *A.* come to twenty-one years of age;" for the first devisee may survive *A.* or have issue alive at the time of his own death, living *A.* in the one case, or survive *A.*'s arriving at the age of twenty-one years, in the other, in which cases the first estate shall not be abridged, but shall only be abridged if the first devisee die without issue, living *A.* or before *A.* come to twenty-one years of age^k. Thus, where the manor of *E.* was holden by knight's service, and *A.* the ancestor, &c. by his will devised the whole manor to his wife, until his son and heir should come to the age of twenty-four years, and that when his son arrived at the age of twenty-four years, his wife should have the third part thereof for her life, and his son should have the residue; and that if his son should die before he came of the age of twenty-four years without heirs of his body, the land should remain to *B*^l. The deviser died; the son came to the age of twenty-four years; and the question was, whether the son had an estate in tail, for then for two parts he was not in by descent. And Dyer and Manwood were of opinion, that here was not any estate in tail; for no tail should

^k *Allen v. Rivington*, 1 Sid. 445; *Dyer*, 354; *Pell v. Brown*, 2 Cro. 590. ^l *Hinde v. Lyon*, 3 Leon. 64.

rise unless the son had died before his full age, and therefore the tail should never take effect, and the fee-simple did descend and remain in the son, unless that he died before the age of twenty-four years, in which case the estate would then have vested with the remainder over; but the son having attained to that age, he had the fee by descent of the entire manor. So in the case of *Collinson v. Wright*, where the testator devised land to his son and heir, and if he died before his age of twenty-one years, and without issue of his body then living, then the remainder over; the son survived twenty-one years, and then sold the land, and died^m. And the question was, If the sale was good? which depended upon whether the son was seised in fee or in tail; and it was held, that he had fee immediately; for the estate-tail was limited to commence upon a subsequent contingency.

Again, there is a distinction between the before mentioned cases, and cases where the first limitation is in tail and not in feeⁿ; as if the limitation be to *J. S.* and the heirs of his body in fee, and that, if *J. S.* shall die, living *A.* then the land shall remain over to *J. N.* and his heirs, or to *J. N.* and the heirs of his body; that shall not abridge, qualify or restrain the preceding devise, or make the estate-tail conditional, but inasmuch as there will remain a further estate or interest, by way of remainder, to be disposed of to take effect on the determination of the estate-tail; such words will be construed as a conditional disposition of such remainder, that is, a disposition, by which, if *J. S.* dies, living *A.* at the time of his death, *J. N.* will become entitled to such remainder; but if *J. S.* leave issue at the time of his death, and that issue happens several years afterwards to fail, then *J. N.* will have no

^m *Collinson v. Wright*, 1 Sid. 148; *Clache's case*, Dy. 330, 331, 354, a; *Chadock and Cowley's case*, 2 Cro. Rem. 337, 338. 695.

ⁿ *Spalding v. Spalding*, Cro. Car. 185; *Bridgman*, fol. 102; *Fearne's Conting.*

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title to such remainder, but it will be undisposed of by the will, and consequently will descend to the heir at law. And in the mean time both the first estate-tail and the remainder will be liable to be barred by a recovery suffered by *J. S.*

So, although the policy of the law of England will not permit a freehold in land to be limited to commence at a future time by any conveyance *inter vivos*, upon a principle now grown obsolete; yet, for the reasons before suggested, and in similar circumstances, it admits the limitation of a future interest without a preceding estate to support it, *i. e.* a future interest unsupported by any preceding freehold^o. As if one devise to the heir of *J. S.* after the death of *J. S.* this is good as an executory devise^p. So if *A.* devise lands to *B.* in fee, to commence and take effect six months after the testator's death. Of the same nature is a devise of his lands to be sold by his executors if his heir fails of payment of such a sum at such a day. Again, where one had issue four sons and a daughter, and devised to his younger sons and daughter legacies of 20 *l.* to be paid by his eldest son, and devised his land to his eldest son in fee, upon condition, that, if he paid not these legacies, his land should be to his youngest sons and daughter and their heirs; it was resolved, that the first devise to the son and his heirs in fee, being no more than what the law gave, was void; and that it was but a future devise to the second son and daughter upon the eldest son's default of payment^q. So where one devised his land to *J. S.* from Michaelmas following for five years, remainder over to *P.* and his heirs, and died before Michaelmas; this was held good by way of executory devise^r.

Conditional limitation.

There is also another kind of devise, which is called a conditional limitation. This species of devise takes effect

^o 3 Cro. 547, 548.

^p *Clark v. Smith*, 1 Lutw. Cro. Eliz. 833, 919.
798; 1 Salk. 226.

^q *Haynsworth v. Pretty*,

^r *Pay's case*, Cro. Eliz. 8.

in two instances. First, where an estate is devised to one for life, remainder to another in tail, remainder to another in fee, upon condition that tenant for life, or in tail in remainder, shall do or omit doing a certain act. Secondly, where a particular estate is devised to the heir at law of the testator, with remainders over, upon condition that the heir at law shall do or omit doing some particular act; in these cases the limitation to the particular tenant does not operate as a condition of which the heir may take advantage, but as a limitation to determine the particular estate. This mode of construction upon limitations was adopted by courts of law, in order to give effect to the intent of the testator, where it could not have operated had the strict legal construction upon such words prevailed; for, it being a maxim at the common law, that none can enter for a condition broken but the person from whom the condition moves, *i. e.* the grantor or donor, or his heir; and the consequence of the grantor's or donor's, &c. taking advantage of a condition, by entry or claim, being a defeasance of the livery made upon the creation of the estate, and consequently of all estates, as well in possession as in remainder, depending upon that livery, the donor or his heir being, by such entry, in of the same estate as he had before the condition and the estates depending thereupon were created, the estates in remainder, limited by devise, in the first instance, after such estate on condition to a stranger, not the heir at law, would by the entry of the heir of the devisor (and he alone could enter into cases of strict conditions) have been utterly void. But, where a devisor in the limitations in his will uses such conditional words, and proceeds further to limit other estates over on breach of the condition, it clearly is not his intent, that the subsequent estates limited should be defeated in consequence of that act, which he means should give life to them. Now it is a maxim of law, that the words of every man, expressed in his will, shall be taken and expounded according to his intent and meaning; therefore, in these cases, the penalty inflicted (namely, the

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forfeiture of the estate of such tenant on condition) is not considered as a condition to defeat all the other estates, when it appears to be the intent of the party that the whole estate is not to be defeated, but the devise is taken as in nature of a limitation, that is, as if it were to the particular tenant until he break the condition, and when he does any act to break the condition, then his estate to end by act of law. So that, after the act done, the estate of the tenant on condition shall cease and be dissolved, in like manner as where land is given to a man as long as *J. S.* shall have issue of his body, or until *J. S.* die without issue of his body, remainder over; in which cases, if *J. S.* die without issue, the land and the freehold in law will be presently in the remainder-man, so that he has the possession in law before entry. And this construction as to wills, the rule being, that where the intent is shown by words and they are not aptly put, there such sense ought to be put upon the words as is suitable to the intent; and therefore, as, in sense, such words clearly design limitations, they shall import them in devises, where the intent only is regarded; and the words, although not apt in law for the matter, are drawn to the intent. And in instances of the second kind, viz. where the estate subjected to a condition is given to the heir at law, it is the intent of the devisor that he shall do or be restrained from doing that, which is the subject matter of the condition. But if, in such case, it were taken to be a condition, and that there were no other penalty for the breach of it but entry only, then if the heir himself did the act or thing forbidden, or omitted doing the act or thing required, the condition would be thereby extinct; for the title of the condition passes with the land, so that he cannot enter for the condition broken by himself contrary to his own act; now this would be inconsistent with the intent of the devisor, who means that the heir should be restrained to do or from doing the act, subjecting his estate to the penalty; and therefore, to the end that the intent of the devisor may be effected, it shall

not be a condition; but the law annexes another penalty to the heir, which is greater to him than a condition carries along with it, if he comply not with the intent of the devisor. And therefore, wherever there is a limitation with remainder over, made in the words of a condition, which would be construed as a condition, if it could take effect as such, there it ought to be construed as a limitation if it cannot¹. Thus it was held, in an instance of the first kind, viz. where *A.* devised land to his son in tail, remainder to another of his sons in tail, remainder to *S.* his daughter in tail, with divers remainders over to others of his own name; with a clause, that if any of the tenants in tail aliened, sold, wasted, mortgaged or discontinued the same estates, that then he or they should be utterly excluded from any benefit of the devise thereof to him or them, and the estate should immediately come to the party next in tail, that this clause of restraint in the will was not a condition requiring a re-entry, but a conditional limitation, which utterly dissolved and determined the estate².

And where an estate is to remain over for breach of a condition, and the same is devised by express words of condition; yet it will be intended a limitation. Thus if a man have issue two sons, *R.* the elder, and *H.* the younger, and also two daughters, and devise certain lands to *H.* in tail when he shall come to twenty-four years of age, upon condition that he shall pay to his two daughters 20*l.* a year at their full age, and, if the said *H.* die before twenty-four, then wills that *R.* his son and heir shall have the same lands to him and to his heirs, he giving and paying unto his said daughters the said money in such manner as *H.* should have done if he had lived; and if his sons *H.* and *R.* (if the said lands come to the said *R.* by the death of *H.*) do not pay the said money to his daughters aforesaid, then wills that his said lands shall remain unto his

¹ 1 Atk. 42.

² *Scholastica's case*, Plow. 408.

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daughters and their heirs for ever": this is a limitation on the estate of *H.* and not a condition, so that if *H.* pay not the sums to the two daughters after his age of twenty-four years, and at the full age of the daughters, *R.* shall have this by way of limitation, and cannot enter as for a condition broken, because otherwise, *ex gratia*, if this were a condition, it would defeat the portions given to the daughters and the future devise to them, which would be against the evident intent of the devisor.

And such a conditional limitation will be good to introduce an executory or springing devise after a fee. As if *A.* devised to *B.* and *C.* his wife, daughter and heir of the said *A.* lands in *D.* to them and the heirs of *B.* upon condition that they shall assure lands in such places to his executors and their heirs to perform his will, and if they fail, then devises his said lands to his executors and their heirs: this is a good limitation, and no condition; for, if it were a condition, it would be destroyed by the descent to the heir*.

An instance of the second kind, viz. where the estate on condition is devised to the heir, occurred likewise in *Scholastica's* case, above mentioned; for the court said, that the donee and heir, who was first in the tail, was intended to be restrained from discontinuing and barring his entail by feoffment, &c. as well as any of the others; but he could not enter for the condition broken by himself contrary to his own feoffment; which was contrary to the intent of the devisor, who meant that he should be restrained as well as the others. Again, in the case of *Wellocke v. Hammond*, where the condition operated actively, the donee being

* *Wiseman v. Baldwin*, 1 Rol. Abr. 411, pl. 5; *Lady Fry's* case, 1 Vent. 202, 321, 322; *Page v. Hayward*, 11 Mod. 61; 2 Salk. 570; *vide contra*, *Lady Portington's* case, 10 Co. 36; *Thomas's* case, 1 Rol. Abr. 411; *Skirme v. Bond*, 1 Rol. Abr. 412; but these cases are now overruled.
 * *Fulmerstone v. Steward*, Cro. Jac. 692; *Dyer*, 33, a; Cro. Eliz. 359; 1 Eq. Ca. Abr. 187; and *Avelyn v. Ward*, 1 Ves. 420.

required to do an act, the legal consequence was held to be the same. In this case a copyholder in fee of land descendible in borough English, having three sons and one daughter, devised his land to his eldest son, paying to the daughter and to each of his other sons 40s. within two years after his death¹. The deviser made a surrender according to the custom of the manor, and then died. The eldest son was admitted, and did not pay the money within two years. The youngest son then entered into the land: and one point adjudged was, that the word paying, here, made a limitation, and not a condition; for if it were a condition, it would be void and to no purpose, because it would descend to him that was heir to the condition, and so be extinct, and then there would be no remedy, and therefore the law would construe it a limitation of his estate, viz. that it should cease if he did not pay it, and go over to the heir in borough English.

So where *A.* devised his real estate to his brother *B.* and his heirs, on this express condition, that, within three months after his decease, he should execute and deliver a general release to his trustee; but if his brother should neglect to give such release, then he devised it to *B.* his heirs and assigns for ever; the devisee was held, by Lord Hardwicke, to take by way of a conditional limitation².

But words, that are clearly words of condition, are only, for the purpose of effecting the manifest intent of the testator, construed as words of limitation; upon which principle alone the case of *Wellocke v. Hammond*, before cited, which is the leading case on this head, was determined. Therefore, if such does not appear to be the testator's intention, that is, if it be not a necessary construction to give effect to the other parts of his devise; or, if there

¹ *Wellocke v. Hammond*, Cro. Eliz. 204; S. C. 3 Co. 21; *Nota*, condition, when estate in borough English descends to heir at common law. ² *Avelyn v. Ward*, 1 Ves. 420; and see *Rundal v. Ely*, Carter, 71, 171.

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be other parts of the devise from which it may be fairly concluded that this could not be the testator's meaning, the court cannot imply that which clearly appears not to have been the testator's intention: and therefore, in case of an estate-tail, the law will not raise this implication to prejudice the issue in tail, who are the first objects of the testator's bounty, in favour of a remainder-man, who is only a secondary object; because, though a condition when annexed to an estate in fee is meant to be compulsory, yet, when annexed to an estate-tail, it cannot be so meant; but must be intended merely as an intimation of the testator's wishes; for, the donee may bar the estate-tail, and the condition will perish with it^a. Thus, where *W.* devised his estate unto *D. W.* for life, remainder unto *S.* and the heirs male of his body lawfully begotten, and the heirs male of their bodies lawfully begotten; and for the want of such issue, to the heirs male of the body of *D. W.* and the heirs male, &c. and for want of such issue, remainder over^b: provided always, and upon the express condition, that the persons upon whom the estate should descend and come, did, and then should, change their names and take the testator's. And he did also declare, that his several devises of his said estates were likewise on the express condition that no person should plough or commit any waste on the premises, &c. by felling trees, (unless for necessary repairs) or otherwise; but should forfeit the premises and ground upon which the tree should be so fallen, or on which such waste should be committed, to the person who should be next entitled to the premises according to this will. And then followed a devise of the places wasted to the persons next in remainder. The testator died, leaving *D. W.* and his nephew *S.* his heirs at law. *D. W.* afterwards entered, and died; then *S.* entered, and held the estate for about

^a *Quære*; and see *Scholastica's* case.

^b *Gulliver v. Ashby*, 1 Blac. Rep. 607; S. C. 4 Burr.

1929; and see *Rudhall v. Milward*, best reported *Saville*, 76; S. C. Moore, 212.

three years, and then suffered a recovery, and aliened it, but never changed his surname, nor took the name of the testator. Afterwards, one of the subsequent remainder-men in tail entered on the alienee of S. for a breach of the proviso, by S. not changing his surname as required by the testator. And one question was, whether the taking the name was a condition subsequent, of which the heir might take advantage, or a conditional limitation, the breach of which divested the estate? *Et per Curiam*, unanimously, this was not a conditional limitation. It was clearly not an express limitation; and an implication of one could only be made in order to effectuate the testator's intention, and must be a necessary implication to that purpose. Now here it was not so, nor should such an implication be made upon a limitation after estates-tail (1).

Estates created by devise may further be either legal or equitable. Legal, as by devise of lands, or of an use, since the statute, for transferring uses into possession. Equitable; as, first, by devise of an use before the statute for transferring uses into possession; secondly, by devise of a trust in equity.

(1) It is necessary here to observe the distinction between the above case and that of *Rudhall v. Milward* and *Scholastica's* case, both of which, at first view, the case of *Gulliver v. Ashby* seems to contradict: but, in *Scholastica's*, there was a devise over to the next person in tail, by express words, in case the condition were broken; whereas in the cases of *Gulliver v. Ashby*, and *Rudhall v. Milward*, there was no devise over in case the conditions were broken; and in that of *Gulliver v. Ashby*, there was likewise in the very next clause a devise over in case of breach of the condition of not committing waste: from whence it was clear, that the testator conceived that the mere breach of the condition would not occasion the estate to go to the remainder-man: for then, the whole estate would have passed to him by operation of law, and the testator's meaning was, that only the place wasted should pass.

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First, by devise of an use ; and it is clear, that an use might have been devised previous to the statute of uses^c. As a devise of lands supposes a consideration, it will lodge both the land and use in the devisee, if no use be limited upon it ; and it cannot be averred to be to any other use than to the use of the devisee, for that would be an averment contrary to the design of the will appearing in the words of it^d. But if an use be expressed, it will enure to the use of *cestui que use* and will execute ; for a devise only has an implied use, when no other is limited, and *expressum facit cessare tacitum*^e. Thus where *H.* seised of lands held by knight's service, devised two parts of them to *D.* and his heirs, to the use of *T.* his brother and his wife, and afterwards to the use of the said *T.* and his heirs male : it was agreed that a devise might be to the use of another^f.

So it is said, (34 and 35 Eliz.) that, if a man devise lands to another in fee, he hath the use and title of it ; but if it be limited to his use for his life only, the use of the fee shall be to the heir of the devisor ; for by the limitation his intent shall be taken to be otherwise than it would have been taken if this limitation had not been^g. And the better opinion seems to be, that an use so devised will be executed by the statute of 27th Hen. 8, of uses^h. Those who entertain the contrary opinion, contend, that, as the statute of uses preceded the statute of wills, it could not extend to estates created under a power that had no existence until the latter statute imparted it ; for although it be true that the statute of uses speaks of persons seised to uses by virtue of wills, yet this must have applied to lands which were devisable by custom ; as where a person,

^c Fitz. Dev. 22 ; 30 Hen. 6.

^d *Nota.* In this sense the statutes of wills are said to execute the legal estate and the use. See more on this head, *infra*, and 4 Rep. 4.

^e 2 Vent. 312.

^f *Hartop's case*, Trin. 33 Eliz. 1 Leon. 253 ; and see Moore, 107.

^g Popham, 4 ; 30 Hen. 6 ; Fitz. Dev. 22.

^h 2 Lord Raym. 875.

seised of lands devisable by custom, devised them to *A.* and his heirs, to the use of *B.* and his heirs, or to uses at common law: as where a feoffment was made to *A.* and his heirs to the use of *B.* and his heirs, and *B.* devised the use¹. To uses of this description it is admitted the statute extended, but it is said to be difficult to conceive how uses, created under a testamentary power given by the statute of wills, can be within the statute of uses. But if we consider that the statute of uses was a remedial law, made to remove many frauds and inconveniences that were incident to uses in the shape they assumed at that time, it seems by no means difficult to conceive that the benefit of it should, in construction, be extended to subjects not in existence at the time of the making of it, but which were, when introduced, obnoxious to similar mischiefs. It is perfectly clear, from the provisions therein respecting uses created by will, that the legislature had that species of use in its consideration, and was of opinion, that it was equally open to objection as those created in any other manner. The thing then, respecting which this question arises, viz. uses created by wills, did exist at the time when the statute of uses was enacted, and was amongst those instances to which the remedies applied by the statute were pointed; the only question then seems to be, whether a statute made touching a certain thing may not be extended to another thing of the same nature, and in the same degree of mischief, though not existing until afterwards? Now instances of this kind are by no means unfrequent in our books². If then it be not unusual for statutes of later date to be controlled by, and to be construed within the equity of the statutes of elder date, surely our law books furnish no instance in which courts would be more anxious to avail themselves of that doctrine,

¹ See Co. Lit. 277, 278, 323; Co. Lit. 365, a; Plowd. in note; 1 Siderf. 26. 127.

² 4 Rep. 4; 2 Inst. 322,

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than the case now under consideration; for it was plain that the legislature meant that uses under devises by custom should be governed by that statute, from the express words of it; and uses under devises by statute were in equal degree of mischief. But this point seems to have been decided in *Vernon's case*¹. For at common law, no acceptance of a collateral recompense would bar a wife of her dower. The statute of 27 Hen. 8, made a jointure to be a bar, which at that time extended only to a jointure made by act executed in the husband's life-time: but it was held, in this case, that if a man were to devise lands to his wife, after the enabling statutes of the 32d and 34th Hen. 8, of wills, expressly in satisfaction of her dower, and she should accept them, this would be a bar within the 27th Hen. 8, because it is within the same equity and reason, and the diversity is in the manner only, not in the thing. And that such has uniformly been the construction on these statutes, is evinced by the several cases. As where *A.* seised of lands in fee, devised them to trustees and their heirs to permit *A.* to receive the rents and profits for his life, and after, that the trustees should stand seised of them to the use of the heirs of the body of *A.* with a proviso that *A.* with the consent of his trustees, might make a jointure for his wife. And it was adjudged, *per Holt*, Chief Justice, that this would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the statute, which mentions the word trust as well as use^m. So, in the case of *Popham v. Bamfield*², which was (as to this purpose) a devise to *A.* in trust for the use and benefit of *B.*, it was insisted on the one side, and agreed on the other, that the estate was executed in *B.* by the statute of uses, the words being in trust for the use and benefit of the devisee.

¹ 4 Rep. 4, a, b.

Raym. 873; 1 Lutw. 823.

² *Broughton v. Langley*,
2 Salk. 679; S. C. 2 Lord² *Popham v. Bamfield*, 1
Eq. Ca. 108; 1 Vern. 79, 167.

Mr. Butler has furnished us with the arguments used on this occasion against the statute's operating in these cases, but has not given his opinion decisively on the subject. Among other observations, it is suggested, that as, by a devise to *A.* and his heirs, to the use of *B.* and his heirs, the testator shows it to be his intention that *B.* should have the legal fee, the law will put that construction on the devise, and give it that operation^o. But Mr. Powell, in his valuable Essay on Devises observes^p, it is difficult to conceive upon what grounds a conclusion, that such is the intent of the testator, can be drawn from a limitation of this nature in a devise. The presumption appears to him to be the other way. Why, he asks, should we conclude that a testator, in giving an estate to *A.* and his heirs, to the use of *B.* and his heirs, intends *B.* the legal fee, any more than we should, in case a testator gave his estate to *A.* and his heirs, to the use of *B.* and his heirs, to the use of *C.* and his heirs; and yet the operations of these limitations will be different; the former will execute, the latter will not: but if the intention governed and were the same in both cases, (and there is no reason to conclude that it was otherwise, because there could be no reason to insert trustees in the first case, unless thereby it was meant to prevent the legal estate from passing, any more than in the last), then, if the statute of devises executed the use by its own efficacy, independent of the statute of uses, both these estates would be executed; or, on the other hand, if, as seems the more reasonable conclusion, the interposition of trustees to uses was meant in both cases to prevent the legal estate from passing, then the statute of devises would in both cases give effect to these limitations as trusts. But the truth is, that an use limited upon an use by devise is not executed, whereas a mere use is. It is likewise said, that it depends upon the will

^o See note Co. Lit. 277, b; and 1 Sid. 26.

^p Pow. Dev. 278.

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of the testator, whether the statute of uses shall or shall not operate upon the devises in his will; that therefore, where a devise made to the use of *A.* for life with remainders over, if it were to be considered as a limitation under the statute of uses, it would be void for want of a seisin to serve the uses; that it cannot, therefore, be the intention of the testator that it shall operate under that statute; consequently, the law will not force it under that statute, but will leave it solely to its effect under the statute of wills¹. But that, suppose a devise were to *A.* and his heirs, to the use of *B.* and his heirs, that would be good to give the legal fee to *B.* as a limitation under the statute of uses. That the testator, therefore, might intend, and the form of the devise, therefore, does intend, to raise an use under that statute, and the law, in conformity to his intention, extends its operation to the devise. But the true ground upon which the former example stands, is, that in a devise, technical expression is unnecessary. The intention to give to *A.* for life is clear, and then the form of giving, though it be by words that seem to refer to the mode of use, will not overturn the intention; or, to put it in another way, there being no trustee in whom there may be a seisin to serve the use, the statute of uses cannot attach upon the limitation. And the answer to the latter case is, that the intent cannot operate on the statute; for if it might extend, it might also contract its operation².

Suppose *A.* devise to *B.* to the use of *C.* in trust for *D.* in order that, by virtue of the statute of uses or devises, the estate may be executed in *D.* and his wife be entitled to dower at common law, no one will say that *D.* will thereby be in possession of the legal estate, executed in him by the statute either of uses or devises. It is not then the intention of the testator that governs the application

¹ *Quare*; and see *Jenkin v. Younge*, 3 Cro. 230.

² See 1 Rol. Abr. b. 11, K. pl. 12.

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of the statute of uses ; and if that be not the principle upon which the operation of the statute depends, then it must rest upon the foundation of its own efficacy, considered as a great political regulation, attaching upon all property in the kingdom so circumstanced as, from its situation, to be exposed to the mischiefs it was the object of this law to redress. .

Secondly, estates may be created by devise through the medium of a trust. Trusts may be distinguished into, Trusts executed by the statute of uses, and Trusts retained in Chancery, notwithstanding the statute. The distinction between an use, trust or confidence executed by the statute of the 27th Hen. 8, (for all these terms are used to describe the beneficial interest meant to be operated upon by the statute,) and mere trusts executory, or trusts not executed by the statute, is, that, in the former case, by the words of the statute, which are, " that any person who shall have any such use, &c. shall from thenceforth stand and be seised, &c. of such lands, &c. to all intents, constructions and purposes in the law, of and in such like estates as they had or should have of or in such use trust or confidence of or in the same." By the force of which words the legal estate is executed, *i. e.* transferred to the use, and the *cetui que use* has the legal estate in him, in the same degree as before he had the use ; the consequence of which is, that, as to persons *in esse*, the legal estate becomes vested immediately, and as to persons not *in esse*, it becomes vested in them immediately as they come *in esse*, provided they come *in esse* in good time, and if they do not, then the estate goes over to the next remainder-man, in like manner as it would do in case of a common law fee : whereas, in the latter case, viz. of a trust retained in equity, the legal estate still remains in the trustee, to serve and support the trust according to the manner in which it is limited, and the intent of the donor. The first idea of reviving uses under the description of executory trusts was

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conceived soon after the statute was passed, and arose from the following circumstances*. It having been held, that if one, after the statute of uses, by deed indented and enrolled, or, before the statute, by deed, had bargained and sold his land to another in fee to the use of the bargainee for life, &c. or in fee to the use of a stranger, such use limited over was void; because the nature of the transaction and the price paid, implied therein an use to the vendee, viz. the first *cestui que use*, and therefore the limitation over to the use of another was repugnant; for thereby, the use in fee, which was in the bargainee in respect of the consideration, would be taken out of him and carried over to another without a consideration; it became, therefore, a maxim in law, that an use or trust could not be limited out of an use or trust before limited†. When this maxim was established, therefore, there was no idea that a second use or trust could have any effect; but if it were an use, trust or confidence, it was executed by the statute; and where it was declared to be, there it must rest, for that statute operated no further. If it were not executed, it was a nullity, it was void. Therefore, on a limitation to *A.* and his heirs, to the use of *B.* and his heirs, in trust for *D.*, *B.*'s estate was held to be executed by the statute, and *D.* took nothing. But although courts of law strictly adhered to this maxim, and sturdily refused to extend the operation of the statute of the 27. Hen. 8, beyond the first use, courts of equity were not so rigid; but, on the contrary, seized with avidity this opportunity given them by courts of law, to re-establish their jurisdiction over property, by giving effect to these uses or trusts, as affecting the conscience, and so the proper subject of the jurisdiction of courts of equity. Wherever, therefore, an use or trust arises out of land, there the use will be executed by the statute, and the legal estate vested; but where the use arises out of a preceding use

* 1 Anderson, 37; Bro. 340.

† Dyer, 155.

which arises out of land, there the statute will not attach, and the use is retained by equity only, under the denomination of a trust.

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Other species of trusts afterwards were considered as out of the statute; namely, such as, in order to effect the intent of the creator of the trust, required that the legal estate should remain in the trustees, and not execute in the *cestui que trust*^a. As where lands are given to one and his heirs, in trust to receive and pay over the profits to certain persons, in such manner as cannot be effected if the estate pass out of the trustee. So where a devise is to trustees and their heirs, to the use of them and their heirs, upon trust for S. for life, and after his decease in trust for his first and other sons, and the heirs male of their bodies, and for want of such issue, &c. with a proviso, that none of the persons to whom the estate is thereby limited, shall be in actual possession of the whole or any part thereof, till he or they respectively attain his or their age or ages of twenty-one; and in the mean time the trustees to make a handsome allowance for the education of such persons, and the overplus to go to such as shall be entitled thereto^x. Here is an intention plainly declared, that the trustees shall continue in possession of the estate and receipt of the rents, till one to whom an estate for life is limited shall be twenty-one, and the trustees in the mean time are to make a handsome allowance for his education out of the rents; and after the age of twenty-one, such person is to have the possession; that is, the estate is then to be conveyed to him. So where a man devised to J. S. the wife of J. S. the issues and profits of certain lands, to be paid by his executors; this was held, by Rokeby and Eyre, to be a trust for the wife; for, if it were otherwise, the husband should intermeddle when the deviser intended to exclude him^y.

^a *Jones v. Lord Say and Seal*, 1 Eq. Ca. Abr. 383. *Atk. 581; Robinson v. Comyns*, Rep. T. Talbot, 164.

^x *Hopkins v. Hopkins*, 1 ^y *Bush v. Allen*, 5 Mod. 63.

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The kind of uses before mentioned are not executed by the statute, because the legal estate in the land must remain in the trustee, to enable him to perform the trust.

A still further distinction has been taken as to equitable trusts, upon the circumstance of a conveyance being directed to be made by the trustees, or not; for where the trustees have been directed, by the instrument creating the trust, to execute a conveyance of the legal estate, they have been deemed executory trusts, as in the case of *Hopkins v. Hopkins* before mentioned; but where no further or other conveyance is directed to be made by the trustees, but the trust is left, on the declaration or limitation in the original instrument, to take effect as that operates in legal construction, these have been deemed trusts executed, not by the statute, but by the party creating them, they requiring no further conveyance to give them effect. And although Lord Hardwicke, in the case of *Bagshaw v. Spencer*², said that if the question had come recently before him, he should then have thought that there was little weight in this distinction; because all trusts were executory, and, whether a conveyance were directed by the instrument creating the trust or not, the Court of Chancery must decree one, when required at a proper time; yet his Lordship, in the case of *Exel v. Wallace*², said, that he should have that deference for his predecessors as not to lay this distinction out of the case; not intending to say that what all his predecessors had done, was wrong founded.

A trust estate may also be created by devise of an advowson. Thus, where A. being patron and incumbent of S. devised the perpetual advowson of S. to trustees, upon trust, in the first place, to present his son W. if living, and then directed that, after the church should next after his death be full of an incumbent, then they should sell the perpetuity of it, and apply the profits to the payment of his debts, and for his daughters fortune; it was held, that this was a good devise in trust for the residue.

² 1 Atk. 511.

² 2 Ves. 323.

And a mere claim, in equity, to an interest in the trust of an hereditament is devisable. Thus, where *W. M.* seised of the king's moiety in the New River water in fee, conveyed the same to *H. M.* and others, upon trust for himself and his wife during their respective lives, and then that the trustees, out of the rents and profits of the premises, should pay his debts and portions for his daughters at certain days, and, after such debts and portions paid, permit *H. M.* heir of *W. M.* and his heirs, to take and receive the rents and profits of the premises^b. *W. M.* and his lady died. *H. M.* in June 1757, contracted with *W. B.* former husband of *F. B.* for sale to him of fourteen shares of the king's moiety for 7,000*l.* of which 250*l.* was to be paid down, and the rest advanced as the parties should agree. Afterwards, the contract not being performed, *B.* exhibited his bill against *H. M.* to enforce the execution of the agreement; after various proceedings had in the suit, *B.* died, having first devised the benefit of his contract to *C.* and her heirs. And on a bill filed by *C.* it was insisted, that the plaintiff *C.* had no title to have the benefit of the agreement with *B.* for that the breach of an agreement, which was a thing in action, was not devisable. *Sed per Wyld and Rainsford, Justices, the Master of the Rolls, and the Lord Keeper, against the opinion of Wyndham, Justice, this case was of equity and conscience, and the court was to help that side that had conscience. It arose upon a trust, and was an equitable interest, and an interest in a trust was in equity assignable or devisable.*

Another trust devisable, not executed by the statute of uses, is, where one, seised in fee, raises a term for years, and limits it in trust for *A. &c.*; for this the statute will not execute, the termor not being seised.

The power of devising extends not only to the creating actual legal estates or interests in the things before mentioned, but also to the creation of authorities over such

^b *Cornbury v. Middleton*, 1 Cha. Ca. 173, 208.

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estates or things. Thus a man may devise, that *J. S.* shall have the disposing, selling, letting and ordering of his lands, and this will be good to give the devisee a power to direct the management of them, and to lease them at will, but will not warrant a sale by him, or lease for a term of years; for he has no interest, but only an authority^c.

And the law is the same as to a devise that his son shall have his land when he shall arrive at twenty-four, and his daughter to have a portion of 40*l.* at twenty-two, and that his executors shall have the oversight and dealing of all his lands and goods until his children come to that age. The executor may lease the lands at will; but, if the son die before twenty-four, the authority of the executor is determined, and the daughter, as heir, may enter on the lessee, and determine his estate; for, her age is mentioned only to ascertain the receipt of her legacy, and not for any other purpose^d.

But where a man, possessed of a manor for ninety-nine years, made his will, and devised it to *A.* his wife, for life, "to set, let or make estates out of it and them, in as ample manner as he himself might if he were living, during the said term of her life^e;" and after the death of *A.* the testator devised the same to *B.* and his son, and to the heirs of his body engendered, and died; and *A.* being made executor, consented to the legacy, and afterwards made a lease of one tenement, parcel of the said manor, to *C.* for ninety-nine years, if three lives so long lived, and then *A.* died: although it was objected that by this clause *A.* had only a power to dispose of it during her life, as otherwise she might destroy the remainder limited to the son, yet this was held to be a good lease against him; for, if this

^c Dyer, 36, b, pl. 170; because otherwise he could not make livery.

S. C. Cro. Eliz. 678, 734.
Nota, per Popham, if the devise had been that he should make a feoffment or lease for life, this had been an interest in the devisee;

^d *Carpenter v. Collins*, Cro. Eliz. 74; S. C. Yelv. 73; Brownl. 88.

^e *Hele v. Greene*, 2 Rol. Abr. 261, pl. 10.

did not give her power to make leases to continue after her death, the clause would be merely void and idle; therefore, the words set, let and make estates should be intended according to the custom of the country in Somersetshire, which, this being a manor, was to make leases for lives or years, and the testator trusted his wife to dispose hereof in such manner, that his son should have the possibility of it after the estate run out.

Authorities to executors to sell, were frequent before the statute of devises^f. And although generally it is of the nature of an authority to determine by the death of the party who gives it, yet, where given by devise, it is held good for necessity, and because it is supported by the special direction and intention of the party who gives the authority by his will, (that takes effect after his death), and who is dead.

And one point agitated in the case of *Townsend v. Whalley* was, whether the devise of an authority to sell lands was a devise within the statutes of wills, because the statutes were, that every one having lands, might devise them to another person, and in such case, there was no devise to another person, but only a devise that his executors might sell; and the Justices were of opinion that it was lawful, within the statutes of wills, by the equity thereof, to devise authority to sell lands^g.

Authorities are distinguished into two kinds: viz. First, naked authorities. Secondly, authorities coupled with interest. A naked authority is where a man devises that his executors shall sell his lands; or orders that his lands shall be sold by his executors; or appoints, constitutes and empowers *A.* and *B.* whom he makes his executors of his last will, to sell, let or set to sale his estate^h. In all these

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^f Styles, 291; 39 Ass. Lit. 113; 1 Rol. Abr. 330, pl. 3, 17; Perk. s. 541; 9 pl. 14; *Howel v. Barnes*, Cro. Rep. 77; 38 Ass. pl. 5. Car. 382; *Garfoot v. Gar-*

^g *Townsend v. Whalley*, Cro. Eliz. 341. *foot*, 1 Cha. Ca. 75; *Foone v. Blount*, Cooper, 464.

^h 19 Hen. 8, 9, pl. 4; Co.

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cases, the executors have only a naked authority to sell, and after the death of the testator, the freehold descends to the heir, who is entitled to the profits until the sale. But the executors may enter, and make a feoffment of the land; and this will be a good execution of the will, to convey the land to the feoffee, because he will be in by the devise¹. So if one devise that his land shall descend to his son, but wills that his wife shall take the profits thereof until the full age of his son, for his education and bringing up, no interest is thereby devised to the wife, but a confidence; and if the son dies, the wife cannot intermeddle further with the land². And such bare authority is not affected by any alienation of the heir, or any other circumstance intervening¹. Therefore it was resolved by all the Justices, that if the heir, after such devise of an authority, make a feoffment, or be disseised, and the disseisor die seised, or otherwise, such feoffments or bargains are made to the use of feoffees; in all these cases, the devise will be nevertheless effectual, because the authority of the executors of the devisor cannot be impaired by any mesne act of third persons. Neither can such authority be released by the executors. Thus, if a man, by his last will, deviseth that his executors shall sell his land, and dieth, if the executors release all their right and title in the land to the heir, this is void; for they have neither right nor title to the land, but only a bare authority³.

And such authority must be strictly pursued; for the authority to sell is founded upon the will alone, without which no authority would let in the persons directed to sell; the law, therefore, looks upon the sale as a thing annexed to the persons of those to whom the authority to

¹ *Carpenter v. Collins*, 236; *Ibid.* 265; 2 *Leon. Moore*, 774; *Keilw.* 45, a. 221, pl. 280; 3 *Ibid.* 78, 108; 9 *Hen. 6*, 24, 25; 11 *pl.* 118.

Hen. 6, 13, 14; *Co. Lit.* 113; ¹ *Keilw.* 40; 19 *Hen. 6*, 1 *Rol. Abr.* 330, pl. 14. 25, a.

² *Keilw.* 107, 108; 1 *Inst.* ³ *Co. Lit.* 446.

sell is given, and to no others; because of the special trust that is put in them by the testator, which trust no man can have by the will, (which in this respect operates as a warrant of attorney), but only those who are named; and where there is but one of them alive, the authority is relinquished and gone, because, in such case, they do not take as executors *virtute officii*, but as trustees. And that is the reason why they may sell the land, although they refuse the administration. But their executors cannot sell, because the trust is personal; but it is otherwise where they take as executors^a. Therefore, at common law, where the devise was that two executors should sell, one alone could not sell^b. So, where lands were devised to one for life, remainder over in tail, and for default of issue, to be sold by the executors of the devisor, who made two executors, and died, and then one of the executors died, and afterwards tenant for life and tenant in tail died without issue, and then the surviving executor sold the land; the court were of opinion that this sale was void^c.

And if a man had devised that *A.* and *B.* should sell and made them executors, the one could not sell without the other, though one of them had refused to be executor, or died^d.

So where *cestui que use* willed, before the statutes, by testament, that *A.* *B.* and *C.* his feoffees should permit his wife to take the profits of the land during her life, and that, after her decease, the lands should be sold by his said feoffees, and the money received for the same paid to certain persons for certain uses prescribed^e. The testator died, *A.* died, and then the wife died; and the question was, whether *B.* and *C.* the survivors, might sell? and it was ruled that they could not.

^a 19 Hen. 8, 11; 15 Hen. 7, 12; Keilw. 44, b.

^b Jenk. Cent. 44.

^c *Lock v. Loggin*, 1 And. 145.

^d Jenk. Cent. 44.

^e *Dyer*, 177, pl. 32.

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And the law is the same as to executors of executors; for, where one devised his lands to his wife for term of her life, remainder to another for life, and, after their death, that his lands should be sold by his executors, or the executors of his executors, and that the money arising should be employed for the good of his soul; and died; and during the wife's life one of the executors died intestate, and afterwards the other made his executors and died, and then the wife and the other tenant for life died¹. Upon a question, whether the executors of the executor might sell? it was held that they could not, because the authority was joint to the executors of both executors, and therefore if one failed the other could not execute it.

Upon the same principle it has been held, that, where a devise was that the executors should sell the land with the assent of *J. S.*—if *J. S.* die before that he assent, the executors shall not sell, notwithstanding that the death of *J. S.* was the act of God; and in the life-time of *J. S.* they could not sell without his consent¹. But, if the words of the devise be answered, that is sufficient². Therefore if one make three executors, and devise his lands to be sold by his executors, and one of them die before the time of the sale, the other two may sell; because in that case the intent of the testator is taken to be that such executors who shall be alive at the time when the land is to be sold shall sell; and this construction seems to accord with the words of the will, and the intent of the testator. So where a man, having four sons-in-law, devised to his son in tail, and if he died without issue, that his sons-in-law should sell and distribute the money among his daughters; the son died without issue; one of the four sons-in-law died, and then the deviser died³. And it was adjudged, that the

¹ Moore, 61.

² Dyer, 219; Godbolt *et* Gouldsbor. 100.

³ 1 Anderson, 146; Bro. Dev. 31.

² Cro. Eliz. 26; *Vincent v. Leigh*, Dyer, 176, b; S.C. Ibid. 219, a; Co. Lit. 113, a.

sons-in-law who survived might well sell; for it appeared that the testator's intent was to advance his daughters. And the distinction, it was said, was, when the persons to sell were named by their special names and when not. Again, where one devised that his executors, or any of them, or the executors of his executors, or some of them, should sell his land for payment of his debts, and made three executors, and gave 40*l.* legacies by his will, and died. One of the executors died, and the other two sold¹. And one question was, whether two of the executors might sell, when there were only two left, by reason of the words that gave the authority to the executors or any of them. And the court held the sale by two good, by the intent of the will.

Another exception taken to this strict rule, as to authorities not surviving, was, where a man devised his lands to his wife for life, and that, if he should have no issue by his wife, then, after the death of his wife, the lands should be sold, and the money thereof coming distributed to three of his blood, and made his wife and another executors, and died². One executor died, and then the wife sold the lands. And it was held, that the sale was good, although it was not expressed in the will by whom the lands should be sold.

So where a man devised all his manors, &c. to his sister, excepting out of this general bequest his manor of *R.* which he appointed to pay his debts, and made two executors by name, and died³. One of the executors died, and then the other sold the land, and the court held that sale good.

The principle upon which the two preceding cases seem to have been decided is, that there was an authority given by the testator, but no appointment by express words what person should sell the land, for which reason the law

¹ *Townsend v. Whalley*,
Moore, 341; S.C. Cro. Eliz.
524.

² 2 Leon. 220.

³ Dyer, 371, b.

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implied that they should do it that had power to pay the debts or distribute the money, which were the executors^b. The executors, therefore, in such case, took only in their official capacity ; and as where one died the office survived, the authority to sell survived likewise. And it seems that in such case the executors of the executor might sell the land ; because by the common law, before the statute of 25.Edw. 3, c. 4, which gives an action for the executor of an executor, the executor of an executor had power to distribute the goods of the first testator ; and the making such devise of the land is but to direct a distribution, which he might well make by the common law^c.

Upon a similar principle it has been held, that, if the executor be not concerned, and no one be appointed to sell, it ought to be intended that he should sell who has the land, viz. the heir.

Thus, where a man devised land to his wife for life, and that after her death the reversion should be sold, and the money arising therefrom be distributed between his heir and three nephews^d. The heir refused to sell or join with the wife in a sale. And a bill to compel him to join was dismissed by Lord Keeper Bridgman, he holding the will void as to a sale, it not being named who was to sell. But this judgment of dismissal was reversed in the House of Lords, and the heir decreed to sell.

And if the executor, in such case, neglect to sell within a reasonable time, the land shall be recovered against him by the heir^e. Thus, where it was found, upon verdict in assize, that the ancestor of the plaintiff devised land to be sold by the defendant who was his executor, and that he should distribute the money for the good of the testator's soul (a common bequest in those days of superstition); and that, soon after the death of the testator, one tendered money for the land, but not to the value, and that the

^b Anders. 145; Keilw. 45.

^c See Keilw. 107, 108.

^d *Pitt v. Pelham*, 1 Lrv.

304; 1 Ch. Ca. 176.

^e 38 Ass. pl. 3.

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executor had since held the land in his own hands for two years with intent to sell the land at a higher price to some other; but it was found that he had all along taken the profits of the lands to his own use, without doing any thing for the soul of the deceased; it was held by Mowbray, that the executor, in this case, ought, by law, to have sold as soon as possible after the death of the testator, but that the executor, in this case, had not done so, but had applied the profits to his own use; wherefore the plaintiff in assize should recover. And, in such case, if he that is named to sell refuses, he that is to have advantage by the sale, shall have a *subpana* in Chancery to compel him to sell^f.

Secondly, Authorities coupled with an interest^g. As if a man seised of land devisable by testament, devised it to his executors to sell. So, if lands be devised to the executors to be distributed for the good of the testator's soul^h. In this case the freehold is in the executors after the death of the testator, and not in the heir. By this devise, therefore, they have an authority coupled with an interest. Again, if one devise the profits of his land unto his wife until his son be of age, for to bring up and educate him, this is a confidence coupled with an interestⁱ. Again, if one devise the profits of his land unto his wife until his son be of age, for to bring up and educate him, this is a confidence coupled with an interest. So, if one seised of lands in fee-simple make A. and B. his executors, and, by his will, devise that his executors shall have and hold the issues and profits of two parts of his land until his heir by common law come to the age of twenty-one, to the intent that his said executors should therewith pay his debts, perform his legacies, and educate his children; this is an interest in the executors by the devise, and not an authority or confidence only^j.

Authorities
with an interest.

^f Keilw. 45.

^g Bro. Assize, 56.

^h Keilw. 107, 108; 1 Inst. 236, a; Ibid. 265.

ⁱ 2 Leon. 221, pl. 280;

^j Ibid. 78, pl. 118.

^k Dyer, 210.

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And if the like devise be made for and towards the maintenance of children only until they be of age, that also carries an interest^k. And in all these cases of interests, the estate shall not determine until the time limited, although the object of their creation fail; as if the children to be maintained die, or the debts be paid before the term limited to answer them determines^l. And if the devisee in such cases die, his representatives shall have the lands during the time^m.

The principle upon which the last preceding cases turn, is, that the charging the profits until a certain period or event, amounts, in law, to a term to continue until that period or event arrives.

Some doubts having been suggested by a gentleman, as justly distinguished for the depth of his knowledge as for the solidity and clearness of his judgment, respecting the existence of a distinction between a devise that executors shall sell his land, and a devise of lands to his executors to be sold, the former being held to convey a naked authority, the latter an authority coupled with an interest, Mr. Powell, who seldom suffered any inaccuracy of observation, or even controvertible point advanced by any fellow-labourer in the paths of legal learning, to pass unnoticed, has made some observations upon the grounds upon which he conceived this doubt to be raisedⁿ; and observes, that although in many instances, the Court of Chancery will interpose and prevent such devises from failing, for want of parties to sell, (the court

^k *Courthope v. Heyman*, Carter, 25; *Sweet v. Beale*, Lane, 26; *Smith v. Havens*, Cro. Eliz. 252.

^l *Gore v. Blake*, 1 Cha. Ca. 98; *Dyer*, 210; *Carter*, 25; *Lane*, 26, 27.

^m *Smith v. Havens*; Cro. Eliz. 252; 2 Leon. 221; 3 Ibid. 78; *Hutt*. 36; *Balder*

v. Blackburn, Hob. 285; S.C. 1 Brownl. 79.

ⁿ Co. Lit. 113, n. (2); Ibid. 236; but see Ibid. 181, b, n. (3), where Mr. Hargrave seems to confine the observations to cases where executors take as such; Pow. Dev. 302.

considering the application of the money to be raised by the sale as the substance of the devise, and the persons named to execute the power of selling as trustees merely, which brings the case within the general rule of equity, that a trust shall never fail of execution for want of a trustee, and that if one is wanting, the court shall execute the office,) yet many cases may be put, in which a Court of Chancery could not interfere to supply a defect for want of proper parties to execute such an authority°. One instance of this kind occurs on a moment's reflection. Suppose one devised that his executors should sell, and then appointed two executors, one of whom died; if the heir, on whom the land descends, sell to a purchaser without notice, it is clear that if the cases put in the book^p be law, the remaining executor could not sell; it is equally clear that the authority being extinct by death, the alienation by the heir would be unimpeachable, unless the authority could be revived; and yet a Court of Chancery could not, consistently with its rules, give relief against a purchaser for a valuable consideration without notice. In such case, if these words gave a bare authority, those who were to be beneficially interested thereby would be without remedy by reason of the act of the heir, but, on the contrary, if they gave an interest, the estate would be vested in the executors, and the act of the heir could not affect it. And if the point wanted a further illustration, the statute 21 Hen. 8, cap. 4, made expressly to remedy the inconvenience that arose from this strict construction of such authorities, in instances where one of the executors so circumstanced refuses to intermeddle with the execution of such a will or testament devising lands, tenements or hereditaments to be sold by executors, by enabling the other executors who accept and take upon themselves the

° *Pitt v. Pelham*, 1 Lev. 304; *Gwilliam v. Rowell*, Hard. 204; *Lockton v. Lockton*, 2 Freem. 136; *Garfoot v. Garfoot*, 1 Chan. Cas. 35. ^p See Jenk. Cent. 44; and Dyer, 177.

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executorship to sell, and rendering their disposition valid, seems decisively to warrant the opinion of Lord Coke, that at common law, all the persons endowed with such a naked authority must unite in the execution of it, unless in cases where the evident intent of the testator renders a contrary construction absolutely necessary.

Powers to be exercised over lands through the medium of uses, may likewise be created by devise. As if one devise to *J. S.* and his heirs, to the use of *A.* for life, remainder to *B.* in tail, with power to *A.* to limit a jointure, or to lease, or charge. And such power seems to be a legal estate, taking effect under the statute of uses, as the limitation of an use. An opinion of high authority has, however, been conveyed to the world through the medium of a late publication, in which this mode of such a devise as that last-mentioned taking effect is denied, upon the ground, that there will be no seisin in *J. S.* the devisee to uses, consequently no such use in *A.* or *B.* as is executed by the statute of uses^a. As this point is to be observed, their powers to make jointures, or to lease, or charge estates, were originally mere modifications of uses, taking effect as directions to feoffees (*i. e.* trustees as to the disposal of estates in land in particular events,) these directions might have been either as to the immediate application of the profits, or, as to its application on future events or contingencies. The performance of these directions were at first binding upon the conscience only of such trustees, and therefore cognizable only in Chancery. The statute of the 27th Hen. 8, which extended to all uses, as well future when they came *in esse* as present ones, rendered useless the jurisdiction of Chancery over them, by taking away the intermediate character of trustee, and consolidating the use and legal estate. Now, the letter of that statute being, "that where any person stands or is seised," or at any time afterwards shall happen "to be

^a Mr. Booth's opinion, cited Co. Lit. 278, in note.

seised," it is necessary, to bring a case within this statute, that there be a person seised to the use at the instant when the use is to be executed, upon whose seisin the statute may attach, and thereout execute the uses limited to take effect out of the estate conveyed to the trustee for that purpose^r. Then, according to *Chudleigh's* case, all the seisin that is by such instrument creating uses conveyed to the trustees, is immediately executed in or transferred to *tenant que use* of the present uses, i. e. uses *in esse* and which vest immediately. And as to the uses not *in esse*, there is no present seisin existing anywhere, but only a possibility of seisin in the feoffees to serve those uses when they come *in esse*, which is realized as the contingencies on which the future uses depend arise, and which uses then, by force of the statute, draw to themselves a sufficient estate or seisin (part of the original estate or seisin reviving by operation of law in the trustees) to serve them, so that they may be executed by the statute, and the possession transferred to them. To apply, then, the statute, as explained in *Chudleigh's* case, to the instance put by Mr. Booth: The moment the instrument operates, J. S. and his heirs become seised by virtue of the statute of wills of an estate in fee, upon which seisin the statute of uses immediately attaches, and executes or transfers that seisin to all uses *in esse*, viz. to A. for life, remainder to B. in tail, remainder (if there be no further limitation) as an use resulting in the right heirs of the devisor. At that moment *ALL* seisin passes out of the devisee to uses, and executes in *tenant que use*; for the trustee to uses has but a fee, and, either by positive limitation, or by construction of law, that fee is transferred to the use in fee which is in tenant for life, remainder to B. in tail, remainder to the right heirs of the devisor. But still this transfer is with a possibility of a seisin springing up in the trustees to uses, whenever any use under the power,

^r 1 Co. 120.

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which is a future use, calls for an execution, that is, whenever *A.* makes a jointure, &c. Those who are coming in *esse*, draw to themselves the seisin revived in the trustees, which is just that seisin which is necessary to feed that use; and so by construction of the statute, the jointress, lessee, &c. derive their instrument out of the part of the first seisin given by the devisor to the devisee*. Thus it was said, in the case of *Broughton v. Hangley*[†], that the trustees, though the estate was executed in tenant for life, with remainder over, might execute the power and join in making of the jointure; and when it should be made, the jointress would be in by the will, that is, her estate would take effect out of the seisin limited to the trustees to uses by the will, and not out of any estate in *cestui que use* who made the jointure.

VII. OF THE FORMALITIES REQUISITE TO THE VALIDITY OF A DEVISE.

IN treating of this head, it will be necessary to consider the provisions of the statutes of 32 and 34 Hen. 8, and 12 Car. 2.

A devise or will, made pursuant to the statutes of the 32d and 34th of Hen. 8, may be defined to be "an irregular instrument in writing, in law distinguishable from a deed, by which all persons not disqualified, having a sole estate or interest in fee-simple, or seised in fee-simple, in coparcenary or in common, of any manors, lands, tenements, rents or other hereditaments, in possession, reversion or remainder, or any of them; or any rent, common, or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof," may dispose of them at his free will and pleasure, but not to take place until after his death, to any other person, but not to bodies corporate, for such estate or

* 1 Co. 139.

† W. Raym. 873; 2 Salk. 679.

interest therein as he pleases^a. It is said to be an irregular instrument, because those statutes have not prescribed in what form of words the instrument itself, purporting a devise, shall be made; therefore any writing, by which the intention of the party to give or dispose of lands or hereditaments appears, provided such intention is not contrary to the established rules of law, having the formalities required by law, under these statutes, will amount to a devise. A deed, therefore, if made with a view to the disposition of a man's estates after his death, will enure in law as a devise or will^a. And, although an actual delivery be made of it as a deed, if the intent of the donor be to make a will, the instrument will operate as such^c. So a will may be made on several sheets of paper, and the law does not even require that they should be affixed together^a. And where one sheet of a will was found in Essex, and another in Staffordshire, it was agreed, before the statute of frauds, that both sheets made but one will^a. Neither is it necessary that the whole will should be made at the same time; nor is it material at what distance of time from the writing the one part, the deviser resumes the subject and completes the will; for whether the period be two days or two years, the effect will be the same^b.

And a will may be made by several distinct memorandums; which being signed by the testator, will amount to one entire will, if such appear to have been his intention^c.

So a man may make several partial and particular dispositions relating to several parts of his estate, by distinct instruments; and, though written on several papers, they will all stand together; for whatever number of instru-

^a 32 Hen. 8, c. 1; 34, 35 Hen. 8, c. 5; 12 Car. 2, 24; Pow. Dev. 12.

^a *Hixon v. Wytham*, 1 Cha. Ca. 248; S. C. Finch, 195.

^c *Green v. Proude*, 3 Keb. 310; S. C. 1 Mod. 117.

^a 1 Show. 69; Comb. 174.

^a *Earl of Essex's case*, cited 1 Show. 69; Comb. 174.

^b *Carlton ex dem. Griffin v. Griffin*, 1 Burr. 548.

^c Ibid.

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ments in the nature of wills a man makes, yet if they be not contradictory, they are considered in law as making together but one devise ; and, taken together, contain the devisor's whole will as to his whole property. Thus, where *A.* seised of lands in Blackfriars, and also of other lands, made a will, and thereby devised the former lands to the hospital of *B.* in Smithfield, and afterwards made another will, and devised lands he had elsewhere to *C.* it was held by all the Judges that both wills, being of divers things, might stand together^d.

And as a man that hath several real estates may devise them by several and distinct wills, so likewise he may make several devises of different interests in one and the same estate. Thus, where *A.* by one will, devised his lands to *I.* his youngest son and his heirs, and afterwards married again, and then by another will devised the land to his wife for life, paying annually to *I.* his youngest son and his heirs such a rent ; the latter will was held to be no revocation of the former ; but that both might stand, although they were by several writings, unless the last were manifestly contrary to the first will, or expressly revoked the former ; and in this case the testator's intention appeared, that he did not mean to alter the will as to his son, but only to provide for his wife, whom he had married after the first will was made ; and by the appointing of the rent to his son, it appeared his intent was, that the reversion should be to his son^e.

So likewise a latter devise may modify and qualify what is given by a former, without revoking it ; and a legacy may take effect out of both. Thus, where *A.* the brother of the defendant, made a will, dated October 12, 1738, and thereby, among other things, gave to his sister *E. B.* the sum of 800*l.* and also to his sister *C.* the sum of 400 *l.* and after giving other pecuniary legacies, bequeathed the remainder of his estate, and all his freehold and per-

^d 1 Show. 545 ; Ibid. 553. Eliz. 721 ; and see 1 Ves.
^e *Coward v. Marshal*, Cro. 187.

sonal estate whatsoever, not therein otherwise disposed of, after payment made of his just debts and legacies, to his brother *S. B.* whom he also appointed his executor: afterwards *A.* by a subsequent will, dated the 22d May 1741, revoking all former wills, gave to his sister *C.* the sum of 100 *l.* and to his sister *E. B.* the sum of 400 *l.* and, lastly, gave and bequeathed to his brother *S. B.* all the rest of his estate, real and personal, and appointed him his executor. There was also a memorandum directed to *S. B.* in the following words; viz. "I beg to recommend my sister, *E. B.* to your kindness; and, besides the legacy left her, I beg you would give to my godchild 200 *l.*; and in case that child should be dead, I desire you may give that sum to her eldest son. I desire this only in case you make use of the last will." This was signed *R. B.* and dated June 9, 1741¹. A bill was brought by *E. B.* and her husband, to have the legacies left to her raised and paid by the defendant, out of the testator's real estate. And one question was, whether the lesser legacies under the second will, were a charge upon the testator's real estate? And Lord Hardwicke said, this was a question of some difficulty; but he was of opinion that they were. He considered the question in two lights: first, as if new legacies had been given originally and *de novo*; secondly, whether these were not part of the same legacies deduced and newly modified? By the words of the second will, "he gave the rest of his estate, real and personal, to his dear brother *S. B.* and appointed him his executor²." So that the land, as well as the personal estate, was given to the same person that he made executor: all the legacies, therefore, if considered as *de novo*, would be charged upon the land. But, he thought the legacies given by the second will might be considered as part of the money given by the first, only new modelled or qualified.

¹ *Brudenell v. Boughton*, 2 Atk. 268.² *Ibid.*

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And a will may be made to take effect, with reference to another instrument. Thus, where a testator willed that his younger children, not married, should have such several annuities or annual rents, as was expressed in several writings signed with his hand, and sealed with his seal, according to the true meaning of the said writings^b. And the court held, that this will, devising such rents which were mentioned in such writings under the devisor's hand and seal, was a good devise, in writing, of the rents themselves: for it referred to the writing, whatsoever it was, as if it had been specifically limited in that will. So where the directions of a will were for the executors to pay 3,000*l.* as the testator should by deed appoint, and the testator afterwards by deed appointed, so that the bequest depended upon the deed: *per Curiam*, the deed referring to the will is, as to this purpose, to be taken as part thereof, in the nature of a codicil thereunto, explanatory of the will^c.

And as a man may make several wills of distinct parts of his land, or distinct interests in them, so, likewise, may he make one or more codicils, altering, explaining, adding or subtracting from what has been before devised, or devising parts of his land not given by his will; and the law will annex such codicil or codicils to his will, and consider the whole as one instrument^d.

In the construction of the statutes of Henry 8, it has been held, that every devise or bequest of lands or hereditaments made pursuant to those statutes, must be entirely in writing; that being a circumstance, without which, lands, tenements or hereditaments cannot be effectually given by virtue of the power of devising allowed by those statutes^e. But the Judges, whose business it was to expound

^b *Molineux v. Molineux*, Cro. Jac. 144; Noy Rep. 117; and see 2 Atk. 273. ^c *Fuller v. Hooper*, 2 Ves. 242; and see 1 Ves. 187. ^d See *Bland v. Middleton*, 2 Cha. Ca. 1; Plowd. 345. ^e *Metham v. Duke of Devonshire*, 1 P. Wms. 530.

the statutes of Henry 8, yielding to the bent of the times, and with a view to extend the privilege of devising as much as possible, in the construction they gave to the word "writing," took it in its most extensive and vague sense. Thus, if a man expressed by a letter, what was his will respecting the disposition of his land, it would be a good devise^a. Nor was it deemed necessary that the writing should be by the devisor himself; for if it were written by another, by his direction, it was sufficient^b. And it is said, in two cases^c, that, if one lying *in extremis*, having an intent to devise his lands, by word had made such devise, but had not commanded the same to be put in writing, and another, without the knowledge or command of the devisor, had put it into writing in the life-time of the devisor, this had been a good will; for it was sufficient if the devise were reduced into writing in the life-time of the devisor. The same rule was laid down, as to a devise of lands officiously put in writing by a by-stander, if done by the command of the devisor, or by his consent, but not it was said if by any person present, of his own head, unless it was afterwards read to him^d. But the writing must have been by the person directed to make the notes or will by the testator; for, *per* Wray, if he appointed A. to write his will, and it was written by B. it was void, unless it were afterwards read to the testator, and he approved it^e.

In the exposition of these statutes it was also held, that the devise must be completely put in writing during the life of the devisor. Therefore, if a man had commanded another to make his will, and to devise W. Acre to J. S. and his heirs upon condition, and he had written the

^a *West's case*, Moore, 177, pl. 314.

^b *Browne v. Sackville*, Dy. 72; S. C. Anderson, 34, pl. 85; S. C. by name of *Brown v. Atkins*, Keilw. 989, a.

^c 1 Leon. 79, pl. 120; 3 Leon. 113, pl. 155.

^d 11 *Newdicate's case*, Dy. 72; *Bate's case*, 1 Sid. 362; 2 Keb. 345.

^e Cited in *Nash v. Edwards*, 1 Leon. 113.

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devise to *J. S.* and his heirs, and before he had written the condition the deviser had died, this devise would have been void; and the reason was, that the devise was not full, but maimed and imperfect; because the whole devise to *J. S.* was not put in writing^{*}. So where a man intended his lands for *J. S.* with remainder to *J. D.* and the deviser died before the remainder was put into writing; this was held not to be a devise within the statutes of Hen. 8, because the one devise depended on the other^{*}. But where the deviser directed several distinct devises, and he happened to die after the completion of one, and before the other was put into writing, the former was held good; and therefore, if one had commanded another to make his will, and thereby to devise *W. Acre* to *J. S.* and his heirs, and and *B. Acre* to *J. N.* and his heirs, and he had written the devise to *J. S.* and his heirs in the life of the deviser, and before the devise to *J. N.* and his heirs had been written, the deviser had died, yet the devise to *J. S.* had been good^{*}.

And it was held, that a devise, under these statutes, if in writing, might be good in part, and void as to the rest. Thus, where *P.* devised certain lands to his wife for her jointure, and the scrivener inserted a condition, and the deviser hearing it read, said this was not his intention; the devise was held good, and the condition void^{*} (1).

^{*} *Cesar v. Lake's case*,
Dyer, 72, n. (2); 3 Co.
31, b.

^{*} Ibid.; 1 Skin. 72.

^{*} Ibid.; and 3 Co. 31.
^{*} *Sir Richard Peshall's*
case, Dyer, 72, n. (2).

(1) But where the directions were to devise on condition, and the devise was without condition, this was held, *per Curiam*, to be void. So where the deviser gave his instructions to make his will in writing, and directed his land to be given to one of his sons for life; and the clerk, mistaking, wrote an estate in fee, three Judges against one held, that the will was utterly void, because it was not the will of the testator. The reason of which latter

But, signing by the devisor was not held to be necessary under these statutes². Nor was it necessary even that the testator's name should appear on the face of the instrument; for where a man made his will in this manner, "I will and bequeath my land to A." and the name of the devisor was not in the will; yet it was held, that the devise was good by averment of the name of the devisor³.

In short, the disposition of the courts to support this species of alienation carried them so far, that any scrap of writing, though it was neither signed, sealed nor written by the testator, might have been established by the evidence of one witness as a will of land; and even though that person were a legatee, if he released. Thus, in *Sir Edward Worsley's* case, some loose sheets of paper were produced as the will of Sir Edward, written by his attorney, and a title set up under them in favour of his natural daughter. Sir Edward had not signed them, and there was no evidence offered to prove them published, but that of the attorney who was a legatee of a sum of money, and also had an annuity for life bequeathed to him. But a release of the annuity and acquittance of the legacy being produced, the court admitted his evidence, and a verdict was thereupon given in favour of the will⁴. The amount of the evidence, as stated by Siderfin, was, that Sir Edward dictated a writing made by his attorney, and caused it to be interlined, and said, that he intended to write it over again himself, but in the mean time, that this

² *Dine v. Munday, Bate's* case, Sid. 362.

² *Stephens v. Gerrard* 2 Keb. 128, pl. 82; S. C. 1 Sid.

³ *Anon.* 2 Leon. 35; S. P. 315, pl. 33.

³ *Ibid.* 79.

latter determination seems to have been, that the devise was not written in the life of the testator; whereas, in the former case, the devise was written, and more. *Ludwell v. Sympton*, 1 Keb. 880; *Downhall v. Catesby*, Moore, 356; S. C. Co. Ent. 252, cont.

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should be his will; but he refused then to sign or publish it as such; and the conclusion was, "In witness whereof, "I have put my hand and seal to every sheet," and he had not done it to any one sheet; yet the court held this a sufficient will, and so it was found by the jury^a. This decision, disinheriting an heir at law by a will so made and so attested, and the same person being drawer, legatee and witness, though consonant to law at that time, was considered as a very great hardship; and the dangerous consequence of deviating so far from the safe and sound rules of the common law, in the alienation of property, became so obvious to every one that reflected upon the consequences that must follow such a decision, that in the end it was enacted, by stat. 12 Car. 2, (usually called the statute of frauds), that "all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by that statute (statute of frauds), or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the devisor, by three or more credible witnesses, or else they shall be utterly void and of none effect."

The object of which was the adding such solemnities to the publication of wills as the legislature conceived best calculated to guard men *in extremis* against fraud, and to protect the heir from being disinherited by instruments executed by those, whose bodily strength might be sufficient to enable them to set their marks to dispositions of their property, the object of which their mental faculties were too weak to comprehend.

But it is observable, that the legislature has not in this statute, any more than in the statute of Henry 8, prescribed any particular form of words in which an instrument, pur-

^a 1 Sid. 128.

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porting a devise, should be conceived. Hence it follows, that any paper-writing, which would have constituted a valid devise before the statute of frauds, will be equally valid as such, since the making of that statute, if the forms and solemnities required thereby attend its publication^c. Upon the construction of this statute, it has been holden, that all devises of lands, situated in England, must be made pursuant to this statute, though the devise be made abroad, in a country where no such formalities are required. For, *per Curiam*, the will being made beyond sea makes no difference, it being of lands in England; since if they passed by will, they must pass such a will, and so circumstanced and attested, as the laws of England require^d.

To what estates
the statute ex-
tends.

And upon the principle adverted to in a former part of this work, that "where an act of parliament altereth the service, custom, tenure, interest of the land or other thing, in prejudice of the lord or tenant of copyholds, there the general words of such an act shall not extend to them." This statute is holden not to extend to copyhold lands. Where, therefore, the devisor, by a paper-writing, written with his own hand, and signed by him, but not sealed, and without date, devised all his lands, freehold and copyhold, to his nephew, his heirs and assigns for ever; *De Grey, Chief Justice, et Cur.* "here is a surrender to the use of a last will, by which surrender the legal estate passes^e. The use is to be directed by the will. This instrument falls under that description. It is a last will, good to convey chattels, twice signed by the testator, at the top and in the conclusion, and, as such, proved in the spiritual court. It is therefore a sufficient will to direct the uses of

Copyhold not
within the stat.
12 Car. 2.

^c See *Brudenell v. Boughton*, 2 Atk. 368; and see *Vincent v. Stanfield*, Pow. Dev. 50.

^d *Coppin v. Coppin*, 2 P. Wms. 291.

^e *Roe ex dem. Gilman v. Heyhoe*, 2 Blac. Rep. 1114; and see *Burkitt v. Burkitt*, 2 Vern. 498; *Wagstaff v. Wagstaff*, 2 P. Wms. 259; 2 Bro. Cha. Ca. 56, 261.

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a copyhold, which need not be attested according to the statute of frauds."

But it was held by the Master of the Rolls, that if a copyholder was seised of a trust or equity of redemption only of a copyhold, and devised the same, there must be three witnesses to the will; for in such case, there could be no precedent surrender to the use of the will to pass this trust, and the trust and equity of redemption of all lands of inheritance were, he said, within the statute of frauds and perjuries, otherwise great inconvenience would arise; and it was no prejudice to the lord of the manor to comprise the trust of a copyhold within that statute, because the person who had the legal estate of the copyhold, was tenant to the lord, and liable to answer all the services^f. Lord Hardwicke, however, in a subsequent case, declared himself to be of a different opinion, and held that the trust of a copyhold would pass by a will not attested according to the statute of frauds, as a copyhold surrendered to the use of a will would do; for that equity ought to follow the law, and make it at least as easy to convey a trust as a legal interest^g. And the same point was afterwards again agitated before his lordship, and received a like determination^h.

As the devising clause in the statute of frauds extends only to lands made devisable by that statute, the statutes of wills, or by custom, it does not affect any disposition made of chattelsⁱ, these being devisable at the common law. But yet a term, attendant on the inheritance, has been considered within the spirit of this clause, and therefore not devisable but by a will executed in conformity to the statute of frauds; for terms attendant upon inheritance

^f 2 P. Wms. 261; and see *Appleyard v. Wood*, Sel. Ca. in Chan. 42; 2 Bro. Cha. Ca. 56; and 3. Ves. jun. 191.

^g *Tuffnell v. Page*, 2 P.

Wms. 126, in *notis*; and see *Attorney General v. Barnes*, 2 Vern. 597.

^h *Attorney General v. Andrews*, 1 Ves. 225.

ⁱ *Gilb. Rep. Eq.* 169, 170.

in equity go to the heir, and not to the executor, and are in that respect to be considered as part of the inheritance; and a will not made pursuant to the statute of frauds, will not pass any estate of which the heir, as such, would otherwise have had the benefit^k.

So likewise a trust of an inheritance cannot be devised but by a will made according to this statute; because, if the law were otherwise, it would introduce the same inconveniences, as to frauds and perjuries, as were occasioned before the statute, by a devise of a legal estate in fee-simple^l.

So also an appointment of land, under a power, if made by will, must be executed according to the statute of frauds, or it will not be valid; because, where a power is given to appoint the uses of land by deed or will generally, the will must be intended such an one as is proper for the disposition of land, this case being within all the inconveniences that the statute of frauds intended to prevent^m. And, therefore, if a devise of lands to an university, college, or the like, be void, *qua* such by reason of its not being executed according to this statute, it will not enure as an appointment under the statute of 43 Eliz. c. 4; for a writing that imports a will, if void as a will, cannot operate as an appointment, the statute being to be taken strictly, to prevent frauds, at a time when, from a weak state of mind or debility of body, people are more easily imposed uponⁿ.

And where a sum of money was given originally, and primarily out of land, it was clearly held that a will, creating such a charge, must be executed with all the solemnities necessary to a devise of the land itself: because it

^k *Whitchurch v. Whitchurch*, 2 P. Wms. 236; Pow. Dev. 55.

^l *Adlington v. Cann and Andrews*, 3 Atk. 152; and see *Wagstaff v. Wagstaff*, 2 P. Wms. 258.

^m *Longford v. Eyre*, 1 P. Wms. 740.

ⁿ *Attorney General v. Barnes*, 2 Vern. 597; and see *Wagstaff v. Wagstaff*, 2 P. Wms. 258.

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was considered, in a court of equity, as a devise of part of the land, since it could only be raised by sale or disposition of the land°. So rents arising out of land, partaking of the nature of the land, are consequently within the purview of this statute.

And so also a power given by will to executors to sell his lands, without any express devise to them, must be executed according to the statute, as being equally within the meaning of the act, as an express devise of the land^p.

Devise to be signed, &c. by devisor.

We now come to consider the last requisites of the act, namely, that the will be in writing, signed by the devisor, or some person in his presence, and by his direction, and attested by three witnesses in his presence; as to which it is observable, that although writing is the first solemnity required by this statute in the making a will, it was, in fact, an unnecessary provision as to all lands except those which were devisable by custom or otherwise, previous to the statutes of wills; devises of lands made devisable by those statutes being thereby required to be in writing. It applies, therefore, particularly to lands of the former description, which, being left by the statutes in the same situation in which they were at common law, continued, where so authorized by custom, devisable by parol; and to prevent the frequent perjuries which were committed by putting words into testators mouths, that had never been spoken by them, it enacts, generally, that all devises shall be in writing^q.

The second solemnity appointed by this clause is, "that the will shall be signed by the party so devising the same, or by some other person in his presence, or by his direction." The latter part of the clause was inserted in favour of persons who by accident had lost their hands, or who

° *Brudenell v. Boughton*,
2 Atk. 268, 285.

^q *Skipwith's case*, Godb.
14, 15.

^p 2 Ves. 179; 2 Ves. jun.
232.

by blindness, palsy or other diseases incident to the human frame, were incapable of performing this ceremony themselves (1). Few years elapsed, after the making of this statute, before doubts were entertained in Westminster Hall, as to what the legislature meant by the word "signing;" namely, whether it should be construed in its strict sense, and by analogy to other instruments; or whether it should be liberally expounded, and left open as a question of construction upon intention, to be inferred from the facts and circumstances attending each particular case.

The first case in which this became a question was that of *Lemayne v. Stanley*^r, in the 33d year of Cha. 2. It arose upon a trial in ejectment; and the case, as found upon a special verdict, was this: *Stanley*, seised in fee by will in his own hand-writing, beginning thus, "In the name of God, amen—I, John Stanley, make this my last will and testament," devised the lands in question; he had not subscribed his name thereto, but only put his seal; this instrument was subscribed by three witnesses in his presence; and the question was, whether this was a good will, *quoad the lands*? And the reporter states, that, after many arguments, it was adjudged by the court (namely, North, Wyndham, Charlton and Levinz), that it was a good will; for, being written by the testator himself, and his name being written therein, that it was a sufficient signing within the statute, which did not direct whether the will should be signed at the top or bottom, or in the

^r *Lemayne v. Stanley*, 3 Lev. 1; S. C. 3 Mod. 219.

(1) The ceremony of signing, used by the civil law, seems to have been chosen rather than that of sealing and delivering, which was the feudal solemnity attending the execution of deeds; because the seal, which had been formerly a great mark of distinction in families, was not so at the time of this statute being passed, and the form of sealing and delivery had not so strong a tendency as signing to effect the great purpose of this clause—the discovery and prevention of frauds. Gilb. Rep. Eq. 261.

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This adjudication will probably startle the student, as the word "signing," used in the statute, conveys to a common ear, not versed in the subtlety of technical reasoning, a mere simple idea, viz. the writing the name of the devisor at the bottom of the will, thereby formally authenticating it as his; it should seem, therefore, to require the ingenuity of a schoolman so far to wrest this word out of its natural sense, as to construe it to mean the *recital* of a name in any part of an instrument, where common form or accident may happen to introduce it; and nothing but the strong bent of the times in favour of this mode of alienation, which equally pervaded the courts of law and the people, and which had induced that loose construction of the word "writing," in the statute of wills, that rendered the statute of frauds necessary, could, it is imagined, have given colour to the argument in favour of such a construction; but the disposition to encourage alienation by wills, prevailed so much at this period, that the ingenuity of the advocate in explaining away, by construction, the excellent provisions made by this clause to prevent fraud, could only be equalled by the avidity with which courts received and supported such exposition†.

But although, where the intention of the testator is clear and the transaction fair, courts of law will endeavour so to construe the circumstances as to give effect to the intention, and not suffer a good will to be avoided by a slip in form; yet they cannot so far explain away the statute, as to give effect to a constructive signing upon a presumed intention, where there is positive evidence to contradict that presumption. Thus, where a will was prepared in five sheets, and a seal affixed to the last, and also the form of attestation written upon it, and the will was read over to the testator, who set his mark to the two first sheets, and

* 1 Eq. Ca. Abr. 403, pl. 9.

† Pow. Dev. 64.

attempted to set it to the third, but being unable from the weakness of his hand, he said, "he could not do it, but that it was his will;" and on the following day, being asked if he would sign his will, he said "he would," and attempted again to sign the two remaining sheets, but was not able so to do; the court of King's Bench seemed to be of opinion, that this was not a signing; for the testator, when he signed the two first sheets, had an intention of signing the others; he therefore did not mean the signature of the two first sheets as the signature of the whole will; consequently there never was a signature of the whole, but only a beginning to sign^u.

The distinction between the last case and that of *Lemayne v. Stanley*, furnishes two principles of construction on this branch of the clause; namely, first, that if the intention to devise be certain, and the requisitions of the statute be verbally complied with, the law will imply an intention in the testator to conform to the statute, and by coupling the fact and the intention, give effect to the instrument. In the case of *Lemayne v. Stanley*, the intent to devise was certain, and the name of the testator was *de facto* on the instrument. The court, therefore, the statute not having pointed out where the signing was to be, to give effect to the devise, implied an intent to sign at the outset of the will. Secondly, that although the statute be verbally complied with, yet, if the express intention of the testator be to carry the requisitions of the statute into execution formally, but an accident intervenes to prevent him, the court cannot, by construction, supply the defective execution. Thus, in *Right v. Price*, though the intention that that instrument should be the testator's will was clear, the court could not raise an intent in the testator by implication, that signing of the first sheet should be a signing the last, because the intent of the testator to sign all the sheets was express, and so not open to presumption.

^u *Right v. Price*, lessee of *Cater*, Doug. 241.

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It was also held by North, Wyndham and Charleton, in the case of *Lemayne v. Stanley*^x, that the devisor's putting his seal to his will would be a sufficient signing within the statute, for that *signum* signifies only a mark, and sealing was a sufficient mark that such instrument was his will; but of this Levinz doubted, and cited a case from 1 Roll's Abridgment^y, of a submission to an award, *ita quod* it was made, signed and delivered; an award was made and delivered, but not signed, and it was held a bad award.

But the court having, in that case, rested their decision, in favour of the will, upon the ground of the testator's having actually written his name thereto, the observation thrown out in that case, as to sealing being signing, must be considered as a *dictum* of the court merely, and not as a formal decision on that point^z. And no question seems to have been made upon it from that period until the 13 Geo. 1, when, from a short note in Strange, it appears to have been agitated before Lord Raymond, on an issue out of Chancery *devisavit vel non*; and it is stated by the reporter to have been there determined by his Lordship, that sealing a will is a signing within the statutes of frauds and perjuries^a. This doctrine, however, appears to have been very much doubted in a subsequent case, in which Lord Chief Baron Parker, Baron Clive, and Baron Smith (absente Legg) are reported to have said, that what is said by North, Wyndham and Charleton, in *Stanley's* case, viz. "that putting a seal to a will is a sufficient signing within the statute of frauds," is a very strange doctrine; for that, if it were so, it would be very easy for one person to forge any other's will, by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand. And the barons said, that if the same thing should come in question again, they would not hold that

^x 3 Lev. 1; 3 Mod. 219.

^y 245, pl. 25.

^z *Lemayne v. Stanley*,
supra.

^a *Warneford v. Warneford*,

² Stra. 764.

sealing a will only, was a sufficient signing within the statute^b.

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One principal evil meant to be remedied by the framers of the clause of the act now under consideration, was the secret and private manner in which wills were frequently executed, and the frauds which in consequence were practised; with a view to check which, the clause introduced a third ceremony to be observed in the making of wills; namely, that the signing of the instrument by the testator should be in the presence of three or more credible witnesses, and attested by them in his presence.

Attestation of witnesses.

In the construction of this word "attested," to the act of executing the will, the legislature has been considered as having called the attention of the persons attesting to three several objects; (that is to say) first, the sanity and competency of the testator; secondly, the act of his signing the will; and, thirdly, his publication of it as such when signed.

An attestation, by the three witnesses, to the sanity and competency of the testator is a necessary inference, as well from the nature of the transaction, as from the objects of the statutes; for the name of the instrument necessarily imports, that there must be a capacity of disposing in the devisor at the time of executing it; and that is so essential to its validity, that a formal declaration of his sound and disposing mind is become the introductory clause in such instruments. In the construction of this statute, therefore, it has been held that the legislature, when it required the witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing; for it was not merely the abstract act or form of signing that the legislature required as one necessary solemnity to the constitution of a devise; for an idiot or lunatic might put his name to an instrument, and yet be

^b *Smith v. Evans*, 1 Wils. 313; and see *Gryle v. Gryle*, 2 Atk. 182.

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perfectly ignorant of its contents ; but the legislature, in the word " signing," comprehended another idea, namely, signing an instrument intending it to be a will, consequently the mental power or capacity of willing was necessary, as well as the corporeal power of putting the mark or name to constitute a signing (1).

And in conformity with this doctrine, it was said by Lord Hardwicke, in the case of *Wallis v. Hodgson*, that it had been determined over and over, that the devisee must show the deviser to have been of sound and disposing mind when a will was to be established as to real estate; for proving that it was well executed according to the statute of frauds and perjuries, was not sufficient^c. And there is an instance, in Viner's Abridgment, of a will having been set aside, after forty years possession under it, upon account of the insanity of the deviser, although in prejudice of a purchaser^d.

The liberal construction which the courts put upon the word " signing," necessarily raised a question upon the import of the word " attesting" such signature; namely, whether the witnesses were to attest the very act and

^c *Wallis v. Hodgeson*, 2 Atk. 56.

^d *Squire v. Pershall*, 8 Vin. Abr. 169, pl. 13.

(1) Hence it is to be noted, that the business of the persons required by the statute to be present at executing a will is not barely to attest the corporeal act of signing, but to try, judge and determine whether the testator is *compos* to sign. In equity, therefore, the sanity of the deviser must be proved, which is one reason why a will can never be proved as an exhibit, *viva voce*, in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that court, never to establish a will unless all the witnesses attesting are examined; because the heir has a right to a proof of sanity from every one of them, whom the statute has placed about his ancestor. *Harris v. Ingledew*, 8 P. Wms. 93; Camd. Arg. 23.

factum of signing, or whether an acknowledgment by the testator, that the act was done by him, and that it was his hand-writing, was not sufficient to enable the witness to attest? for it was contended, that this word should receive a construction agreeably to the law and rules of evidence in other cases, and that, as an attestation upon an acknowledgment was good in every other case, so, in this, an attestation, on the acknowledgment of the testator that it was his hand-writing, should be an attestation of the act of signing. And, indeed, this seems a necessary conclusion, from the decision of the case of *Lemayne v. Stanley*; for it cannot be supposed that in that case the testator wrote the will in the presence of three witnesses*. In the case of *Parsons v. Cook*, however, the Lord Keeper seems to have entertained some doubt upon this point†; but the point having been brought before Sir Joseph Jekyl, in the case of *Smith v. Codron*, in which case A. signed and published a will in the presence of two persons, who attested it in his presence; then a third person was called in, and the testator, showing him his name, told him that was his hand, and bid him witness it, which he did, and subscribed his name in the testator's presence; and the testator, two hours after, told him that the paper he had subscribed was his will; His Honor held the will to be well executed‡. So, where, in proving a will, disposing of a real estate, there was full proof that the three subscribing witnesses did subscribe their names in the presence of the testatrix, but one of them said he did not see the testatrix sign, but that she owned, at the same time the witnesses subscribed, that the name signed to the will was her own hand-writing, His Honor the Master of the Rolls held this to be, without doubt, a sufficient signing

* *Lemayne v. Stanley*, Cha. 184; see *Dormer v. Skinner*, 227; 3 Lev. 1; 3 *Thurland*, 2 P. Wms. 506. Mod. 219.

† *Smith v. Codron*, cited.

‡ *Parsons v. Cook*, Prec. 2 Ves. 455; 1 Ves. jun. 11.

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and attestation^b. And the decision of Sir Joseph Jekyl, in *Smith v. Codron*, was mentioned and confirmed by Lord Hardwicke in the case of *Grayson v. Atkinson*, in which the same point came before his Lordship¹.

But where a will was executed, first in the presence of two witnesses, and afterwards the testatrix said, "this is my will," in the presence of a third, and desired he would attest it, but did not put her seal nor acknowledge that her name was of her own hand-writing, Lord Hardwicke gave no absolute opinion, but was inclined to think that this was a void will, because it was not exactly conformable to the statute of frauds and perjuries; for it should have been re-sealed by the testatrix in the presence of the third witness, and she should have acknowledged it to be her hand-writing^j. And his Lordship expressed his doubts, whether sealing alone, in the presence of the third witness, without such acknowledgment, would have been sufficient to make this a good will^k. And, if the word "attested," made use of in the clause, is to receive a construction by analogy to the exposition of this word, as applied to deeds, it cannot be carried further than to give effect to a signing, upon an acknowledgment thereof by the testator^l. Signing, therefore, is, as to the purposes of this statute, to be considered as analogous to sealing in common-law conveyances, and the same evidence which was required to prove a sealing at the time when this clause was passed, was considered as sufficient to prove a signing within it. And as, in the case of sealing, it was not sufficient to prove the seal to be that of the donor, without proving the semblance of sealing, or an acknowledgment of the seal, (the latter of which is now

^b *Stonehouse v. Evelyn*, 3 P. Wms. 253. 182; and see Doug. fourth edit. 244.

¹ *Smith v. Codron*, 2 Ves. 455; *Grayson v. Atkinson*, 2 Ves. 454. ^k And see *Stonehouse v. Evelyn*, 3 P. Wms. 254.

^l See Pow. Dev. 74.

^j *Gryle v. Gryle*, 2 Atk.

proved by proving the signing and the semblance of sealing,) because the seal might be forged; so it is necessary, in the case of signing, that the attesting witnesses to a will should prove the actual signing by the testator, or the acknowledgment thereof by him, because the signing might be forged.

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With respect to the *publication* of the will, the courts, in construing the statutes, have held, that since the publication of a will was an essential part of it, as the law stood before the statute of frauds, and there was nothing in that statute to take it away, the deviser must still do some act declaratory of the instrument being his will; but any act or declaration, importing a solemn intent in the testator to dispose of his estate, will be sufficient. This was held to be the law by Lord Hardwicke, in the case of *Ross v. Ewer*^m: and in support of that opinion, his Lordship cited the case of *Mr. Windham*, of Clearwell, which occurred in the Court of King's Bench. It was a trial at bar on the will of his uncle; and the only question was, whether the testator published it? for, his Lordship said, there was no doubt of his having executed it in the presence of three witnesses, or of their attesting it in his presence; which showed that publication was, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form.

Publication of
the will.

But no particular form of publication being necessary, delivery as a deed has been holden to be a good publication of a willⁿ. Thus, where the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed, and not a will; for it was delivered as his act and deed, and the words "sealed and delivered" were put above the places where the witnesses were to subscribe their names: it was adjudged by the court, as it is said, for the inconveniences

^m 3 Atk. 156.

ⁿ 8 Vin. Abr. 125, pl. 13.

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that might arise in families, from having it known that a person had made his will, that this was a sufficient execution^o. So, if the deviser show the will unto the witnesses, saying, "this is my last will and testament," or, "herein is contained my last will," this is sufficient, without making the witnesses privy to the contents thereof, provided the witnesses be able to prove the identity of the writing; that is to say, that the writing showed is the very same writing which the testator in his life-time affirmed before them to be his will, or to contain his last will and testament^p.

And a publication may be inferred from circumstances, and will have the same force to render the instrument valid as if expressed by parol declaration. Thus, where *W.* made his will of real estate in his own hand-writing, and the form of attestation, in the testator's hand, was "signed, sealed, published and declared for the last will and testament of the said *W.* in the presence of us," and was signed by the testator, attested by three witnesses. To prove the will, the devisee produced one of the three subscribing witnesses, who deposed, that, upon being sent for by his master, entering the room, he found him sitting with a table before him, on which were some papers open; and that his master called him and the other two witnesses, and desired them to take notice; and then took a pen, and in all their presence, signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses, which they did by the direction of the said *W.* in his presence, and in the presence of each other, he showing them severally where to write their names. But the said *W.* did not declare or publish either part to be his will, or say what it was. And Mr. Justice Denison was of opinion, that (if the witnesses for the defendant were credited by the jury) this was a due execution within the statute, and a sufficient pub-

^o *Trimmer v. Jackson*, ^p *Swinb. 52; Godolph. 4 Bum's Ecc. Law, 117.* O. L. 66.

lication; and the jury found accordingly for the defendant.

As the ceremony of signing a will has been considered as analogous to the ceremony of sealing a deed, so the solemnity of publishing a will seems to be analogous to the ceremony of delivery of a deed. It appears, indeed, rather extraordinary that the framers of the devising clause in the statute of frauds should have omitted requiring this solemnity: it probably arose from an apprehension that the ceremony of signing required by the statute would be construed to mean an actual signing by the testator, in the presence of all the subscribing witnesses; in which case, it should seem, there would have been no necessity for the addition of any further ceremony to secure the testator and identify the instrument, as the whole must then have been one entire transaction.

It is necessary that the whole will should be present at the time of attestation; for, if a man make a will in several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the first, this is not a good will.¹ And unless there be positive proof that the entire will was not in the room, whether it was so or not, is a question of fact for the consideration of the jury, on the particular circumstances of the case. Thus, where it was proved that C. made his will, consisting of two sheets of paper all of his own hand-writing, and signed his name at the bottom of each page; and that he also made a codicil of his own hand-writing upon one single sheet, and called in H. showed him both sheets of his will, and his signature to every page thereof, and told him that this was his will; and then showed H. the codicil, and desired him to attest both the will and codicil, which he did, in the presence of the testator, and in the manner appearing upon the face

¹ *Wallis v. Wallis*, 4 Burn's Ecc. Law; and see *Peate v. Ougley*, Com. 197. ² 3 Mod. 263; 1 Eq. Ca. Abr. 403, pl. 7.

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of the instrument, and then went out of the room^{*}. V. and L. came in immediately afterwards, and the devisor showed them the codicil, and the last sheet of the will, and sealed both before them. C. then took each of them up severally as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but never saw the first sheet of the will; nor was that sheet produced to them; nor was the same, or any other paper upon the table. Both the sheets of the will were found with the codicil in the testator's bureau after his death, all wrapped up in one piece of paper; but the two sheets of the will were not pinned together. And Lord Mansfield delivering the opinion of all the Judges in the Exchequer Chamber, said that every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention; and that they all thought the circumstances sufficient to presume that the first sheet was in the room; and that if the jury should be of opinion that it was then in the room, they ought to find for the will generally.

Subscription of witnesses.

The fourth ceremony required by the statute is the subscription[†]; and to this it has been held, that a man may make his will in several writings, and at several times; and that if a will be written in three several sheets of paper not tacked together, and subscribed by three witnesses severally, one name to each sheet, this would be a good will within the statute. So, if such loose sheets of paper are wrapped up in a clean sheet of paper, and the witnesses subscribe their names to that clean sheet, this, it is said, will be a good attestation of a will.

The next doubt that occurred on the construction of this act, was, on the words, "in the presence of the testator;" and in expounding these words the courts have held the

^{*} *Bond et al. v. Seawell* agreed by counsel, and assented to by Dolbein; and
[†] *et al.* 3 Burr. 1773; S. C. see 3 Burr. 1775; 2 Blac.
 Blac. Rep. 407, 422, 454.
 Carth. 37; 3 Mod. 263, Com. 410.

words "in the presence," as synonymous to *within the view*; and, consequently, that if the witnesses subscribe within the view of the testator, that is a good subscribing according to the statute of frauds. The first case, in which this point came in question, was that of *Sheers v. Glasscock*^a, where Sir George Sheers being sick in bed, signed his will in the presence of three witnesses, but (he being very ill) the witnesses withdrew into a gallery, between which and the chamber where the testator lay, there was a lobby with glass doors, and the glass broken in some places; in this room the witnesses subscribed the will. It was proved that the testator might have seen, from his bed where he lay, the table in the gallery on which the witnesses subscribed, through the lobby and the broken glass windows: and this was adjudged a good will to pass lands; for the statute required attesting in his presence to prevent obtruding another will in place of the true one, it was therefore enough if the testator might see, it was not necessary that he should actually see the signing: because if that were the case, if a man did but turn his back, or look off, it would vitiate a will; here the signing was within the view of the testator, he might have seen it, and that was enough. So, where the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and opposite to the door, and both that door and the door of the room where the testator lay were open, so that he might have seen them subscribe their names if he would; that was held sufficient, though there was no proof that the testator did actually see them subscribe^x. And it was said *per Curiam*, that if the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed be drawn close, it is a good subscribing; because it is in his

^a *Sheers v. Glasscock*, 2 Salk. 688; Carth. 81; 1 Eq. Ca. Abr. 403, pl. 8. ^x *Davy and Nicholas v. Smith*, 2 Salk. 395.

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power to see them, and what is done shall be construed to be in his presence. And in a case where a testatrix having gone to her attorney's office to execute her will, but, being asthmatical, and the office very hot, retired to her carriage to execute it, the witnesses attending her; and, after having seen the execution, they returned into the office to subscribe it¹; the Lord Chancellor was of opinion that the will was well executed, the carriage having been put back to the window of the office, through which it was sworn, by a person in the carriage, the testatrix might have seen what passed.

But although the signing be in a room or chamber immediately contiguous, yet unless the testator be in a position in which he can, if he pleases, without changing his situation, see the witnesses subscribe, the will will be void. Thus where a will was subscribed by three witnesses, and the testatrix signed it in their presence, but they did not subscribe it in her presence; she signing it in her bed-chamber, and they subscribing it in a hall where it was not possible from her chamber to see what was done; the court were of opinion that, as to the devise of lands, the latter will was void for this defect².

So where a testator duly subscribed his will in the presence of three witnesses, but the witnesses, for the ease of the testator, went down stairs into another room, which was out of the presence of the testator, and attested the will there, the court held that the will was not duly executed³. And though the retiring of the witnesses be by desire of the devisor, it will make no difference; for the devise will nevertheless be void if the testator could not see them subscribe it: as, where the testator published his will in the presence of three witnesses, but he being sick, desired them to go into the next room to subscribe

¹ *Casson v. Dade*, 1 Bro. Comb. 156; S. C. Show. Rep. Ch. 99. 89; Ca. T. Holt, 222.

² *Eccleston v. Petty, al.* ³ *Broderick v. Broderick*, Speke, Carth. 79; S. C. 1 P. Wms. 239.

their names, which they did. And the court and jury were all of opinion that it was not a good will^b.

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And even although the will be executed in the same room where the testator is, and who may see it if he please, yet if the subscribing be done in a clandestine and fraudulent manner, the devise may be void notwithstanding. For, *per* Macclesfield, in *Longford v. Eyre*^c, the bare subscribing the will by the witnesses in the same room, does not necessarily imply it to be in the testator's presence: for it may be done in the corner of the room, in a clandestine fraudulent way, and then it will not be a subscribing by the witnesses in the testator's presence, merely because in the same room. And the law, as stated by Lord Macclesfield, seems conformable to the decision of the Court of King's Bench in the before-mentioned case of *Right v. Price*^d, in which the court held that corporeal presence was not sufficient, unless there was likewise mental knowledge of the fact. That it was usual in precedents of wills to say, that the witnesses subscribed *at the request of testator*, that, indeed, was not expressly required by the statute, but the practice showed the general understanding, and the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case the testator could not know whether the will that he had begun to sign was that which the witnesses attested; he was dead to all purposes or power of conveying his property (1).

^b *Mackell v. Temple*, 2 Show. 288.

^d *Right v. Price*, Dougl. fourth edit. 241.

^c 1 P. Wms. 740.

(1) And in the case of *Hands v. James*, it was determined that the question, whether present or not, was a fact for the consideration of the jury upon all the circumstances of the case. *Hands v. James*, Comyns, 531; *Croft v. Pawlett*, 2 Stra. 1109; 2 Eq. Ca. Ab. 765, pl. 18.

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What a sufficient subscription by the witnesses.

Many questions have also arisen with respect to the requisite that the signing of the testator should be in the presence of "three or more credible witnesses," particularly as to what shall be deemed to be a signing by three witnesses; and whether the three witnesses must attest and subscribe at one and the same time, or may attest and subscribe at several times. The first of these points was first brought before the court in the case of *Lea v. Libb*^c; where the will of *D.* was signed and published by him in the presence of two witnesses, viz. *W.* and *B.* who attested and subscribed the will in the presence of the testator. About a year afterwards, *D.* made another writing or codicil, which was signed and published in the presence of two witnesses only, viz. *B.* who was a witness to the will, and *H.* who was a new witness. And by which he declared that his will should be ratified and confirmed in all things, except as he had altered it by that writing, which should be accepted and taken as part of his will. At the time of making the codicil, neither the first will, nor the last witness thereto, viz. *W.* was present, and the codicil was separate and never annexed to the will. And upon a question whether, by this will, signed and attested as above, the lands were well devised within the statute of frauds^f, the court held, that the will and the codicil together were not sufficient to pass the lands^g; for that the statute of frauds expressly required three witnesses to every will by which lands are devised; that a certain method was pointed out thereby, which every person in making a will ought to pursue to prevent fraud, consequently, those who would have the benefit thereof, ought to adopt the means thereby prescribed, which was not done in this case, because *H.* who was witness to the codicil only, could not thereby become a witness to the will; and Holt, Chief Justice,

^c *Lea v. Libb*, Carth. 35;
S. C. Ca: T. Holt, 742; S. C.
Comb. 174; 3 Mod. 262;
¹ Show. 68.

^f Ibid.

^g Ibid.

argued that, if lands had been devised by the codicil, such devise would certainly have been void, not being sufficiently attested; because one of the witnesses who subscribed the will was in nowise concerned touching the codicil, and one of the witnesses who subscribed the codicil, was in nowise concerned touching the will. So where *I.* by his will, which, after his death, was found in a drawer in his closet, written with his own hand, and signed and sealed, but not witnessed, devised freehold and copyhold lands, and afterwards, as he lay on his death-bed, made a writing, which he called a codicil, to be annexed to his last will, and was attested by four witnesses, but his will was not then produced^b; and on a question whether this will was duly executed according to the statute of frauds, it was held, that the will not being executed according to the statute of frauds, could not be valid to pass the freehold lands, and that it being taken notice of in the codicil, would not mend it; for the codicil might be executed in another room for aught that appeared, and the witnesses thereto see or know nothing of the will.

Again, where the Earl of Bath, having made his will in 1684, in 1701 sent for seven persons, and told them, "he sent for them to be witnesses to his will," and sometimes "to be witnesses to the republication of his will^c," and then took a codicil, dated 15th August 1701, in one hand, and the will in the other, and said, "this is my will, whereby I have settled my estate, and I publish this codicil as part thereof," and then signed the codicil (which lay upon the table with the will) in the presence of the witnesses, who subscribed in his presence. By this codicil he devised in these words: "whereas I heretofore made my will, dated 11th October 1684, which I do not intend wholly to revoke, but in regard to the many accidents and alterations to my family and estate, I by this

^b *Attorney Gen. v. Barnes* Chan. 151; 2 Vern. 597.
^c *et al. Prec. Chan.* 270; S.C. ^d *Penphrase v. Lord Lans-*
Gilb. Rep. Eq. 5; 3 Rep. *down, cited Comyns,* 384.

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executed his will in December 1735, in the presence of two witnesses, who attested the same afterwards in his presence; in the year 1739, he with his pen went over his name in the presence of a third witness, who subscribed his name in his presence and at his request; and on a question, whether this was a due execution of the will under the statute of frauds and perjuries, *per* Lee, Lord Chief Justice, this case depends upon the words of the statute; the requisites in the statute are, that the three witnesses shall attest the signing; but it does not direct that the three witnesses shall all be present at the same time. His lordship said, that there had been no determination as to this point. That, in the case of *Cook v. Parsons*, the testator's signing was held good enough, though it was not before three witnesses at the same time: and the court only doubted whether the testator's barely owning the subscription to be his, before one of the witnesses, was good; but there was no doubt as to the validity of the will, from the execution at different times. Here was the oath of three attesting witnesses; this was the degree of evidence required by the statute, and the same credit was given to three persons at different times as at the same time. That the court could not carry the requisites further than the statute directed; the act was silent as to this particular; it would, therefore, be making a new requisite: the signing was the same act reiterated; the testator, in the principal case, went over his name again, and declared it to be his last will, and judgment was given against the heir at law (1).

(1) But it is to be observed, that though the execution of a will, where the testator signs in the presence of one witness and afterwards in the presence of two, or where the witnesses sign at three several times, be sufficient to pass lands by the statute, yet it is the safest way to execute the will in the presence of all three witnesses; because there may be great difficulty in the proof where the testator signed, if the witnesses attest and subscribe separately. And if the witness or witnesses who subscribed by themselves

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witnesses.

The next and last word essential in the construction of this clause of the statute is the word "credible," as applied to the witnesses. Upon which three points have been made. First, what persons are "credible" witnesses, within the meaning of the act. Secondly, whether non-credibility can be purged by any matter, *ex post facto*, so as to establish a will, the witnesses to which are not credible at the time of its execution. And thirdly, whether, allowing that witnesses, not credible, cannot be admitted to prove their own devises, they may nevertheless be let in to prove other devises wherein they have no interest.

The first case, that with respect to who are such witnesses as are described by the word "credible," in the act, was that of *Hilliard v. Jennings*^p, where one of the witnesses to a devise of lands was a devisee in the will. Upon which it was held by the court, that the will was not executed according to the statute of frauds, for that the intent of the act was to prevent frauds as well as perjuries; which intent would be evaded if the devisee should be admitted to be a witness, for he being a party interested, might be induced to use fraud; and it was said, that the statute appointed three witnesses, &c. to the end that the transaction might be in such a solemn and notorious manner that they might see that the devisor, being infirm as well in understanding as in body, as all men generally *in extremis* were, did not suffer any imposition; but that, if persons who could not give evidence of their

^p *Hilliard v. Jennings*, Com. Carth. 514, but more accurately, 1 Freeman. 510; 1 Lord Raym. 505. Ca. B. R. T. W. 3, 276;

selves should die, it would be difficult to prove the will; for proof of the hand-writing could not be admitted where there were living witnesses to the will, and they could not prove the subscription of the third witness who was dead. Besides, if any of the witnesses in such case swear that the testator was not sane, or either of them deny his own hand-writing, great difficulty may incur in establishing a will so circumstanced.

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subscription, should be admitted to be credible witnesses, it was to admit so many dead letters to be witnesses; which entirely evaded the intention of the act.

It having been decided, in the above case, that persons anyway interested, as well as persons rendered incompetent by crimes, were not within the description of credible witnesses, the next question agitated was, whether non-credibility could be purged by any matter *ex post facto*. This point was brought before the Court of King's Bench, in the case of *Holdfast* on the demise of *Amsey v. Dowsing*¹, which arose on a special verdict on an ejectment; and the facts therein stated, material to the present question, were as follow: T. devised the lands in question to A. for life, &c. then he charged all his real and personal estate with annuities and legacies; and particularly with an annuity of 20 *l.* per annum to E. the wife of H. for life, and to her separate use; and also gave a legacy of 10 *l.* each to H. and his wife. To this will there were three witnesses who subscribed their names, whereof H. was one. They were all living, so likewise was the wife of H. The devisee, before and at the trial, made a tender to H. of 20 *l.* for his and his wife's legacy, which he refused to accept, and those legacies, at the time of the trial, were not discharged. This cause was three times argued at the bar; at length the opinion of the court was delivered by Lord Chief Justice Lee. His lordship said, that the right to devise depending upon powers given by statutes, they must all be considered together, as creating one general parliamentary rule; the particulars of which were, that it must be in writing, signed, and there must be an attestation of three credible witnesses, in the presence of the devisor. These were checks introduced to prevent men from being imposed upon, and certainly meant

¹ *Holdfast v. Dowsing*, 2 but no division; see also *Strange*, 1253; and see 1 *Price v. Lloyd*, 1 Ves. 503; Ves. 503, S. C. where on 2 *Ibid.* 874; *Brograve v. appeal* the judges differed, *Winder*, 2 Ves. jun. 636.

that the witnesses who were required to be credible, should not be such as claimed a benefit by the will: that if the tender should be equal to the payment of the two money legacies (as it was not) yet the annuity charged upon the estate devised would still subsist; and, though it was charged both upon the real and personal estate, and the personal (which was not found to be sufficient) would be the first fund, yet it was for *H.*'s advantage to enlarge the fund, by taking in the real estate; and, at law, the husband must be considered as benefiting by the annuity, though given to the wife's separate use; for it was his money the moment it was paid into her hands, or, if not, it eased him in point of maintenance. It had been objected, that nothing vested until the death of the deviser, and that therefore, at the time of the attestation, he had no interest. But the answer was, that he was then under the temptation to commit a fraud, and that was what the parliament intended to guard against. Another way that it had been attempted to be supported was, that it might be void as to the annuity, but good as to the devise; which was grounded upon an expression in Carthew's report of *Hilliard v. Jennings*, that the will was void *quoad* the devise of lands to the plaintiff. But that whoever read that will from the record, would see that there were no other lands devised, and therefore it was equal to saying it was void as to any passing of lands; and that it was proper to confine the invalidity of it to lands, because as to personal estate it was certainly a good will. That a contrary construction would open a door to fraud. It was agreed that this man could not be examined; how then was he that credible witness that the statute required? The true time of his credibility was the time of attestation; otherwise a subsequent infamy, which the testator knew nothing of, would avoid his will. That the Digest, lib. 28, tit. 1, l. 22, *De testibus, subscriptione et signis*, was express: *Conditionem testium tunc inspicere debemus cum signarent, non mortis tempora*; and so was the Code, lib. 6,

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tit. 23, l. 1. The court therefore held, that this was not a good attestation of a will of lands.

Previous to the case of *Anstey v. Dowsing*, it had been usual, in cases of money legacies to witnesses, to admit them upon payment, or a release^{*}; a practice which appears to have sprung up from the like proceeding in the spiritual court, where the release will make a witness; but it had never prevailed so far as to admit a release or payment to restore the witness where he was a real devisee; so far from it, that the case of *Hilliard v. Jennings* passed always for law without a murmur; but after the true principle of the statute of frauds came to be thoroughly discussed in the case of *Anstey v. Dowsing*, the practitioners took the alarm. It then became obvious that, if the Court of King's Bench were right in their principle, that no such practice could be introduced as to devises, but as it was apparent that the validity of many just wills would come in question, unless some remedy was administered in time, the legislature were applied to, and, by act of parliament, attempted to ease the evil, without in any degree weakening the statute of frauds.

25 Geo. 2, c. 6. For this purpose, in order to remove the doubts which had arisen, who were to be deemed legal witnesses within the intent of the 29 Car. 2, c. 3, s. 5, it was enacted by the 25 Geo. 2, c. 6, "that^{*} if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, interest or appointment of, or affecting any real or personal estate, other than charges on lands, tenements or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, &c. shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, not-

^{*} Swinb. Wills.

^{*} Sec. 1.

withstanding such devise, &c. mentioned in such will or codicil."

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And¹, "that in case by any will or codicil, any lands, tenements or hereditaments, shall be charged with any debt or debts, and any creditor, whose debt is so charged, shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act."

And that² "if any person shall attest the execution of any will or codicil, to whom any legacy or bequest shall be thereby given, whether charged upon lands, tenements or hereditaments, or not, and such person before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness, to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest."

This statute was not, however, it seems, sufficiently comprehensive in its terms, to include every possible circumstance from which a bias in the mind of a witness might be presumed. For cases held to be out of the purview of this statute, soon occurred, which rendered the further discussion of the point of credibility necessary.

Thus on a special verdict, in the case of *Wyndham v. Chetwynd*³, it appeared that W. C. after devising certain parts of his real and personal estate, charged the residue thereof with the payment of all his just debts, legacies and encumbrances. The will and codicil were duly executed in the presence of, and subscribed by three witnesses, two of whom were attorneys at law, to whom the testator was indebted for business transacted, and the third, the apothecary who attended him in his illness, and

¹ Sec. 2.

² Sec. 3.

³ *Wyndham v. Chetwynd*,
1 Burr. Rep. 414.

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whose bill was discharged by the executors before his examination in the cause. Upon these facts the question was, whether these paper writings, or either of them, were or were not duly executed, so as to pass lands. This depended upon two questions; First, whether the facts, as stated, did make these interested witnesses, and render them not credible; Secondly, if so, whether the subsequent circumstances did not remove the objection, and re-establish their credibility. After the court had taken some time to consider of it, they all agreed that the will was duly attested by three credible witnesses. And Lord Mansfield delivered a very elaborate judgment, in which he took occasion to enter very fully into the discussion of the meaning of the word "credible" in the statute of frauds; which his lordship considered as capable of being conferred on an interested witness by payment or a release. But, in a subsequent case^{*}, it is stated, that Lord Mansfield, previous to his delivering his opinion in the last-mentioned case, declared, that it was his own, and he was personally answerable for all its errors; the judgment of the court being general, that they held the will duly executed according to the statute. And the case, in truth, appears to fall fairly within the second section of the act, without need of any particular arguments to support the opinion of the court, for it is observable, that there is an essential difference in the wording of that clause in the statute of the 25 Geo. 2, c. 6, which provides for the case of legatees, and that which provides for the case of creditors, whose debts are charged upon lands or hereditaments; for, in the former case, no provision has been made for persons whose interests, though arising under wills of lands, are not immediate as legatees, but only consequential; instances, therefore, of that nature still remain in the same state as they were in previous to the statute of the 25 Geo. 2. Because that act being an explanatory law,

^{*} Lord Camden Argu. in *Doe v. Kersey*, Pow. Dev. 130.

it cannot be expounded by any strained construction, but must operate according to the express letter, since, otherwise, if any construction could be made against the express letter of the exposition made by parliament, there would be no end of expounding. But in the latter case, a general charge, as well as a particular charge, for payment of debts, seems equally within the letter and spirit of the statute; in the former case, the words of the statute are, "if any person, &c. to whom any beneficial devise, &c. (except charges on lands or hereditaments for payment of debts) is thereby given or made, &c. such devise, &c. so far as concerns such person, &c. shall be void." So that the whole of the clause refers to an immediate legatee, and not to one whose interest is not direct, but consequential; but in the latter clause, the words are, "in case by any will, &c. any lands, &c. be charged with any debts, and any creditor whose debt is so charged, hath attested, &c. every such creditor shall be admitted as a witness to the execution of such will or codicil." The case of *Wyndham v. Chetwynd*, therefore, appears to come expressly within the latter provision of the 25 Geo. 2, c. 6, as to creditors, witnesses, whose debts are charged on lands or hereditaments.

This point of credibility was again agitated, in the case of *Doe on the demise of Kindson v. Kersey*, which came before the Court of Common Pleas on a special case upon an ejectment¹; in which it was held by Clive, Bathurst, and Gould, against the opinion of Pratt, Chief Justice, that a witness, incompetent at the time of attestation, might purge himself afterwards either by release or payment, and become competent by the rule of law.

Upon these cases, which have arisen respecting this question of credibility of witnesses, the authorities stand thus: Lord Chief Justice Lee, and three puisne Judges of

¹ *Doe on dem. Kindson v. Kersey*; 5 Geo. 3, cited 4 Burn's E. L. 93; and Pow. Dev. 130.

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the court at that period, with Lord Camden, and such of the Judges of the Court of King's Bench as differed with Lord Mansfield on the general point, support the doctrine, that credibility has the same meaning as competency, must exist at the time of attestation, and cannot be dispensed with or supplied by any *ex post facto* procedure; Lord Mansfield, and the Judges of the Court of King's Bench, who agreed with his lordship, together with the three puisne Judges of the Court of Common Pleas, who sat with Lord Camden, were of opinion that competency, according to the rule of law at the time when the witnesses were called upon to prove their attestation, was sufficient.

But to those Judges who entertained the former opinion upon this point, we may certainly add the legislature at large, who by the explanatory law of the 25 Geo. 2, have, in all cases to arise subsequent to the 4th June 1752, precisely adopted that exposition; for, although the statute has said, as the case was questionable previous thereto, wills, executed before the time limited therein, shall not be rendered invalid by reason of a mistake in construction; and that, therefore, to effectuate such wills, the common law method of supplying credit by an *ex post facto* act, as a release or payment, shall be sufficient; yet as to all wills to be made after that time, the legislature have expressly said, that no man, not competent at the time of attestation, shall by any subsequent act become credible at the time of examination, by enacting, that to render all men credible at the time of examination, any act to make them incompetent at the time of attestation shall be void^a.

But a legatee may be a witness against a will; for the reason that a legatee is not a witness for a will being, because he is presumed to be partial in swearing for his own interest; it follows, that a legatee, when he swears against a will, swears against his interest, and so is the strongest

^a And see 2 Ves. jun. 636.

evidence^a. And so if it stand indifferent to the witnesses, whether the will, under which they are legatees and to which they are witnesses, be valid or not, the witnesses, though legatees, are credible.

Thus, where the devisee having made a will, in 1746, of his whole estate real and personal, charged with debts and legacies, in which the three subscribing witnesses had legacies; all three released^b. The testator had also made a former will, 1744, attested by three disinterested persons, under which the three subscribing witnesses to the will of 1746, would have had the same legacies. A bill being brought in Chancery to have the latter will established, it was contended, that notwithstanding the will of 1744, (which the testator had revoked as he thought effectually, and might probably have cancelled) it was a benefit to the witnesses, at the time of subscribing, to have a legacy under the latter will. But the Lord Chancellor was clearly of opinion, that these were good witnesses; for at the death of the testator, it was indifferent to them which will prevailed; and his lordship declared the will of 1746 to be well proved.

An infamous person is not a competent witness to a will under this statute. Thus, where the question, on a special case reserved at the assizes, was, whether a person who, before the time of attestation had been indicted, tried, and convicted for stealing a sheep, and was found guilty to the value of ten-pence, and had judgment of whipping, was a sufficient witness within the statute? the whole Court of Common Pleas were clearly of opinion, after three arguments at the bar, that he was not a competent witness; and laid it down as a rule, that it was the crime that created the infamy and took away man's competency, and not the punishment for it^c.

^a *Orendon v. Penerice*, Camd. Arg. 21.

² Salk. 691, pl. 5.

^c *Pendock v. Mackender*,

^b *Lord Ailesbury's case*, 4 Burn's Ecc. Law, 93.
cited 1 Burr. Rep. 427;

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VIII. THE MEANS BY WHICH A WILL MAY FAIL OF TAKING EFFECT.

A DEVISE, though constituted in the manner which has been described in the preceding part of this chapter, may be prevented from taking effect from various circumstances; some of which originate from defects apparent on the face of the instrument, others from collateral matters, or, to speak in technical language, *dehors* the will. Of the first kind is any uncertainty or repugnancy in the words of the will itself, which may arise either from an obscurity in the description of the thing devised, or of the interest therein, or as to the general intent of the devisor; these, in legal language, are termed patent ambiguities. Under this branch also we may include limitations that fail, from being formed to attain objects which the policy of the law forbids the effectuating. Cases of the second kind are, where will fail of effect by reason of uncertainty or repugnancy arising out of facts existing independent of the will; as when doubts arise as to which of several persons or things, in themselves similar and respectively answering the description used in a will, the will was intended to apply; these are, in technical language, termed latent ambiguities.

Under this head of a devise failing of effect, may likewise be ranked cases in which a will becomes inoperative by reason of the testator's performing or satisfying it in his life-time; also those where a devisee waives the benefit of a devise; and cases of fraud by breach of trust; likewise fraudulent devises, under the statute 3 & 4 W. & M. c. 13.

So cases where wills fail of effect by reason of revocation, whether positive or implicative, fall properly under this branch of our subject.

Devise void for uncertainty, &c.

As to the first of these circumstances, it is a rule universally adopted in the construction of wills, that whenever

there is an irreconcilable uncertainty or repugnancy in the disposition made by a testator of his real property, the title of the heir at law shall be preferred to all others; because, where a court cannot find words in a will which either expressly or by necessary implication denote the testator's intention beyond the possibility of a doubt, the rules of law directing descents, which are certain, must prevail, and cannot be superseded by an uncertain devise. Thus one ground upon which Lord Hobart decided in *Cowden and Clerk's* case, was that the clause, "that the land should be to the right heirs of the testator's name and posterity, part and part alike," made the will, then in discussion, repugnant, uncertain and insensible; for if the heir were preferred, that would be an entail, and then none could share with him: and, if the testator meant that all that were males of the name and posterity should take together, then the effect of the word heirs must be rejected, and the sons should take equally with their father^d.

Uncertainty and repugnancy, apparent upon the face of a will, may be either in respect of the application of the words of the will to the thing devised, or to the quantity of interest therein meant to be devised, or to the person described by the devise. With respect to the first of these, the case of *Ride v. Atwicke*, affords an instance^e. There *I.* seised in fee, devised all his freehold land to his wife for five years, &c. and, by codicil, added, "that if any of his three sons, *W. D.* or *I.* died before the five years were out of the freehold, then to be equally divided between those of his sons that should be then living," and no mention of lands was made in the codicil. *W.* and *D.* died within five years, leaving his wife *en ventre* with a child. And the question between this child, who was heir at law to the testator, and *I.* the surviving brother, was, as to the application of the words in the codicil; whether they referred to the

^d Hob. 34; Moore, 860.

^e *Ride v. Atwicke*, 1 Keb. 692, 754, 778, pl. 9.

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freehold, and gave it to the surviving brother, so as that he was to have the whole for life, or whether they referred to the five years term, requiring the freehold to be divided upon the death of either of the sons within the five years. When after much discussion and different opinions in the Judges, the Court, on different grounds, decided in favour of the child of *D.* who was heir at law. But Keeling, Chief Justice, and Hyde, Justice, were of opinion that the codicil was uncertain and derogatory, and so void. So where *P.* seised of two messuages in fee, having issue two sons, *R.* his elder son, and *N.* his younger son, and four daughters, *E. M. O.* and *A.* made his will, and thereby devised his two messuages to *N.* his younger son, and he to have 30*l.* per annum for his maintenance for ten years after the death of his grandfather, the residue of the profits during that time to be applied for raising portions for his daughters; and, if *N.* died, then the estate that *N.* had, to go to his four daughters, share and share alike, and then the testator devised in these words, "and if it shall please God ALL my sons and daughters die without issue, then to my sister and her heirs," &c. The deviser died, then the grandfather died, and then *N.* entered upon the lands, and died without issue. Afterwards the four daughters entered and were seised, and one took husband, had issue, and died, and the husband claimed to be tenant by the curtesy^f. The question was, whether the daughter took such an estate as entitled her husband so to be? it was agreed that *N.* had but an estate for life, and that the words share and share alike, made the daughters tenants in common for life, and that the word estate, as used here, carried no interest, but was only a description of the land, &c. The doubt, therefore, was, whether the daughters took an estate-tail by implication upon the last clause in the will? and the Court were unanimous that they did not. And Herbert, Chief Justice, in delivering the opinion of

^f *Price v. Warren*, Skin. 266; S. C. 2 Eq. Ca. Abr. 357.

the court, said, that they would favour wills in their exposition as far as they could, but where they were so uncertain, that the intention could not be collected, they ought to fail for their uncertainty. That here the testator might have several intents ; for, he might intend that the daughters should have the estate but for life, and then that the sons should have it ; and upon their death without issue, that the daughters should have it ; or he might intend that the sons should have an estate-tail after an estate-tail in the daughters ; or that, after the death of the daughters, it should descend to the sons in fee, and if they died without issue to the issue of the daughters ; and if his sons and daughters died without issue, that he might limit a fee after to his sister. Though there was a fee before, he might so intend. It was quite uncertain what the deviser intended ; and therefore this clause was void for the uncertainty, and there was estate-tail in the daughters, and, by consequence, no tenancy by the curtesy.

But, if the thing devised be clearly described, an error in words of demonstration added will not vitiate the devise. Thus, where *B.* seised in fee of two houses in *A.* the one called the Corner House, in the tenure of *B.* and of *N.* and of another house thereto near adjoining, in the tenure of *H.* (which was the house in question) devised his house called the Corner House in *A.* in the tenure of *B.* and *H.* to *J. S.* in fee, upon condition that the same be new built, according to the covenants between me and *B. C.** The question was, whether the house in the tenure of *H.* adjoining to the corner house, should pass or not ? *et per Curiam*, the corner house only passed by the will, and not the house adjoining, in the tenure of *H.*—because, although the corner house was not in the tenure of *H.* but a misprision, yet the devise was good, for it was sufficiently ascertained before, viz. the corner house in *A.* And the addition *in tenura H.* although it were not in his tenure,

* *Blague v. Gold*, Cro. Car. 447, 473 ; S. C. W. Jones, 379.

DEVISE. but was a mistake, was but surplusage, and, although false, should not vitiate the devise; because the devise was of a thing certain at the first, and should be expounded according to the intent of the parties as apparent; and the case was, they said, the stronger here by reason of the covenant to re-edify the corner house, and not the other.

So a devise may be void for repugnancy. As if one give lands to two women and their heirs of their bodies *sub hac forma*, that she that survives *tenebit totam dictam terram integram* to her in tail; or give to a man and his wife 10 l. annually to them during their lives, and if the husband die first, then the wife to have but 5 l. of the 10 l. In both these cases, the latter provisos are void, because they are repugnant in themselves to the estates in jointure^b.

Uncertainty in
the devisee.

With respect to uncertainty, as to the person described by the devise, it is agreed, that if the person of the devisee be absolutely uncertain, the devise will be void. Thus, if one devise land to the two best men of the White Towers; this devise is void, for these are not persons known, and there is no certain intendment to be collected from the words of such a devise^c. So, if a devise be to one of the sons of J. S. he having several sons; the devise is void for uncertainty, and cannot be made good^d. And if a man devise to twenty of the poorest of his kindred; this is void for the uncertainty who may be adjudged the poorest^e. Again, where a man, having three sons, and being seised of lands in three counties in fee-simple, made his will, and thereby devised one parcel of his land in one county to his eldest son, another parcel in another county to his second son, and another parcel in the third county to his third and youngest son; and devised further, that if any of his sons did die, then the one of them should be heir unto the

^b See 2 Anderson, 12.

S. L. per Bridgm. Ch. Just.

^c Fitzherb. Dev. 7; 49
Edw. 3; 2 Anderson, 12.

^d *Wibb's case*, 1 Rol. Abr. 609, D. 1; and see *Scrope's case*, 6 Rep. 55.

^e Per Tracy, 2 Vern. 624, 625; and Sir T. Raym. 82;

other^m. The father died, and then the eldest son died, having issue a son; and the question was, who should now have the land which the eldest son had, whether his son, being his heir, or his two brothers, being the uncles? and, by Fenner, Williams, Croke and Yelverton, Judges, the will is good to the eldest son, and his issue shall have the land: and the subsequent clause in the will, after the particular devises; viz. "that the one shall be heir to the other," is repugnant in itself to the other part of the will, and therefore void in law; for, by the first clause, the eldest son has the inheritance and an estate for life in his part in possession, and a fee-simple in reversion in the other parts, and, by the last clause, it is not certain what issue shall have it; and judgment was given for the issue of the eldest son against the two surviving sons. But if a man have three sons, and devise one part of his lands to the second son in tail, and the other part to the third son in tail, and that neither of them should sell any part, but that each should be heir to the other, and die; in that case, if one son die without issue, his part shall not revert to the eldest son, but shall remain to the other son: for these words, "that each shall be heir to the other," imply a remainder, being in a will which shall be intended and adjudged according to the intent of the devisorⁿ. And so, in *Hambleton v. Hambleton's* case, where *H.* the father, devised to his eldest son Blackacre, to his second son Whiteacre, and to his third son Greenacre in tail; and further willed that, in case any of his said sons died without issue, then the survivor to be each other's heir. The eldest son died without issue; and the question was, whether one or both the surviving brothers should have Blackacre? And the court, on the first hearing the case, was in great doubt; but it was afterwards holden, that

^m *Wood v. Ingersole*, 8th *Baker's* case, cited 1 Bulst. Jac. 1 Bulst. 61; S. C. Cro. 63; and see Saville, 92, 93. Jac. 260, ill reported; see ⁿ Bro. Abr. tit. Dev. 38; Pollexfen, 482; S. L. *Hill v.* 7 Edw. 6.

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the surviving brothers were joint-tenants, and, although the word survivor was in the singular number, yet, in sense, upon the whole matter, it should be taken and construed as in the plural number; and the survivor should be each other's heir, meaning each survivor^o.

And where one devised in these words; viz. "I give and bequeath one half of my lands to my wife, and after her death, I give all my lands to the heirs male of any of my sons or next of kin^p;" one question was, who was described by the latter words of this clause? And Hales argued, that this devise was void, because it was uncertain; for the intent of the devisor did not appear. It appeared not what heir male should have the land, whether the heir male of his son, or the heir male of his next of kin, for the words were disjunctive. *Et per* Roll, Chief Justice, the intention of the testator here is *caca et sicca*, and senseless, and cannot be known; and we ought not to frame a sense upon the words of a will where we cannot find out the testator's meaning. And Jerman, Nicholas and Ash, Justices, were inclined to that opinion. But a devise is never construed absolutely void for uncertainty, but from necessity; for if there be a possibility to reduce it to a certainty, the devise is good. Thus, where one seised in fee of a house at Ludgate, devised the same "to S. and his brothers successively for their lives," and the testator, after mentioning another matter, went on and said, "And as for my house at Ludgate, I do not leave it to S. nor his brothers afore to be entered on and enjoyed till one month after their marriages^q." S. at the time of making the will had two brothers, R. and O.—S. was the eldest, R. the second, and O. the third son; R. died in the life-

^o *Hambleton v. Hambleton*, 30, 31, 32 Eliz. 1 Leon. 166; S.C. 3 Ibid. 262; Saville, 92, 93; Cro. Eliz. 163; Owen, 25.
^p *Beal v. Wyman*, Styles, 240; 2 Danvers, 514, pl. 4, but no decision.
^q *Ongley v. Peale*, 2 Lord Raym. 1312; 10 Mod. 103; 2 Eq. Ca. Abr. 358; 8 Vin. Abr. tit. Dev. D. Ca. 19.

time of S. and O; and the question was, whether this was a good devise, or void for uncertainty? And it was argued against the devise, first, that it was void for uncertainty, by reason of the word successively not showing which should take first and which second in succession: secondly, that the condition in relation to marriage made it more uncertain; for till marriage none could take; and suppose the second brother had married, and neither of the other two, who must have taken? Certainly none of them; for, if he that was married should take first, then that would overthrow the other construction of successive, that the oldest ought to take first, and then the second, and then the third. *Sed per totam Curiam*, the will was good and certain enough; for being in the case of brothers, the common law was a guide to the exposition of the word successive; viz. that the eldest should, after his marriage, enjoy it first for his life, then the second, and then the third; and the court agreed that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general. And therefore that, if the second son had married before the eldest, yet he could not have taken by this devise:

And if, from circumstances existing independent of a will, the person of the devisee be rendered absolutely uncertain, the devise will be void. As if one devise an estate to his son, and, on inquiry, it turn out that he has several sons; this devise is uncertain for want of the testator's pointing out which son, and consequently the estate goes to the heir at law, which is the eldest. So, if one devise land to his son John generally, and, upon inquiry, it turn out that he has two sons of that name, if no proof can be made of the devisor's intent as to which son he meant, the devise is void for uncertainty; because the law will not make the one or the other by construction inheritable; for neither the elder son shall have it by course of law, because the elder need not have an addition; nor shall the younger have it by construction, by reason the

Uncertainty de-
hors the will.

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father need not have limited the land to the elder, as the land after the death of the father would have descended to the elder. And therefore, for want of proof of such intent, the will is void^r.

So, also, if, from circumstances existing independent of the will, it become absolutely uncertain what land the testator meant to devise, it seems the devise will be void. As if one devise his manor of *R.* to *A.* and his heirs, and it turn out that he was seised of the manors of Great *R.* and Little *R.* or North *R.* and South *R.* and no proof can be adduced to show which manor he meant^s. But, if the devise were of one of the testator's manors of *R.* then the devisee should elect which manor he would have^t.

What evidence
admissible to
explain uncer-
tainty in a will.

Before we quit this head of a will's failing to take effect by reason of uncertainty respecting the intention of the testator, it may be proper to notice what evidence is admissible to explain such uncertainty.

Of parol evi-
dence.

Every instrument in writing consists of two parts; matter of fact, and matter of construction of law^u. The one, namely, matter of fact, may be averred by the parties interested in the instrument, and is triable by jurors; the other, namely, matter in law, is to be discussed by the court only before the same is brought in question, which is to decide according to the language appearing upon the face of the instrument, without reference to any parol evidence to explain it^x. From hence proceeds the rule, that parol declarations of testators offered in evidence, to control their instructions conveyed to writing in their wills, whether of real or personal estate, (for the law is the same in both cases, if the value exceed what is allowed to pass by parol;) or to give an import to their language, which it would not otherwise bear, were from the time

^r *Cheney's case*, 5 Rep. 58, b.

^s *Ibid.*

^t See *Bacon's Maxims*, 100.

^u See 8 Rep. 155.

^x See *Brett v. Rigden's case*, Plowd. 345; 3d resol. Cro. Jac. 145, Moore, 222; *Cheney's case*, 5 Rep. 58.

that wills were required to be in writing, considered as not admissible respecting them. And since the statute of frauds and perjuries, the reason against admitting such evidence is become still more obvious and decisive⁷.

Parol declarations of a testator may apply to the devise, or to the person of the devisee; in either case they are equally inadmissible. I shall first call the attention of the reader to the instances which occur in our law-books respecting parol declarations as to the devise itself; and secondly to such as are to be met with respecting such declarations as to the person of the devisee.

First, as to parol declarations respecting the import of a devise, it was determined in *Cheney's case*, where one devised hereditaments to *H.* his son, and to the heirs of his body, the remainder to *T. C.* of *W.* and to the heirs male of his body, on condition "that he or they, or any of them, should not alien, discontinue, &c." that *T. P.* heir general of the devisor, should not be received to prove by witnesses that it was the intent and meaning of the devisor to include his son and heir within those words of the condition "he or they," and not merely to restrain *T. C.* and his heirs male of his body by those words⁸. So where a grandfather, mortgagee of lands, purchased to himself the equity of redemption thereof, and, having two sons, the elder of whom had disobliged him, the grandfather and the mortgagor joined in a conveyance to *T.* his youngest son; but there was no consideration or trust expressed, and the grandfather continued in possession, leased the same, received the rents, and, by his last will, devised the lands to *T.* but expressed not for what estate, and died. Upon a question, whether this purchase was intended as an advancement for the son, or as a trust for the grandfather? the evidence of two persons, that the grandfather's direction was to devise to *T.* and his heirs, was given, not with a view by such parol declaration to enlarge the effect of the

Parol declarations respecting devise.

⁷ See 2 P. Wms. 136, 137, ⁸ *Cheney's case*, 5 Rep. 141; 1 Ves. 63; 2 Ibid. 217. 58; 33 Eliz.

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will, but as an evidence of the trust and intent. But the court held, that this was a trust, and that the parol proof would not alter the case^a. So in the case of *Towers v. Moor*^b, the plaintiff endeavouring to have the will explained by depositions of witnesses, touching what the testator declared, and the instructions he gave for the drawing of his will; the court said, that devises of land must be in writing, and they could not go against the act of parliament. And one reason given in *Vernon's case*^c, why, if a man devise land to his wife for term of her life generally, it could not be averred to be for the jointure of the wife, and in satisfaction of her dower, was, that the whole will concerning lands ought to be in writing, and no averment ought to be taken out of the will which could not be collected from the words contained in the will (1). And where C. devised lands to the trustees and their heirs^d, upon trust to take the profits for three years, and if, within the three years, there happened a marriage between G. and W. who was then ten years of age and his heir at law, then to W. for life, remainder to her first son, &c. and if the marriage did not happen, then the remainder to F. in tail. The marriage with G. did not take effect, but W. married another person

^a *Elliot v. Elliot*, 2 Chan. Cas. 231, July 1677.

^b *Towers v. Moor*, 2 Vern. 98.

^c *Vernon's case*, 4 Rep. 4, 5; Mich. 14, 15 Eliz.; S. L. *Lawrence v. Dodwell*,

1 Lord Raym. 438; S. C. 1 Lut. 734; 1 Eq. Ca. Abr.

219, May 1717.

^d *Bertie v. Faulkland*, 1 Salk. 232; S. C. 2 Vern. 333; Hil. 9 Will. 3, 1698.

(1) *Sed nota*. Lord Somers was of opinion, that such an averment might be admitted in equity, and decreed accordingly; but his decree was reversed by Wright, Lord Keeper, and that reversal affirmed in Dom. Procerum. But the reason of that affirmation is said to have been, that it had been determined at law. So *quare*, how it would have been, had the case come on first in equity? 1 Lord Raym. 438; but see *Gosling v. Warburton*, Cro. Eliz. 128, *cont.* where expressed.

of equal family, fortune and person. And, on a bill brought by *W.* and her husband to have the estate, suggesting that she ought not to be injured, having done all she could to bring about the marriage, evidence from papers, letters and sayings of the testator, was offered to prove his intent in the will was not that it should be in *G.*'s power to make her forfeit. *Et per Curiam*, consisting of Chief Justice Treby, Lord Chief Justice Holt, and Lord Somers, these collateral papers and all parol proof as to what the testator declared or intended, cannot be taken notice of to influence the construction of the will; for that would be to let them in, and make them part of the will itself; and by the statute of frauds and perjuries, every part of a will must be in writing. And before that statute, when a will was in writing, no collateral proofs by papers or words could be admitted, because a will was a complete and consummate act of itself*.

And in the case of *Strode v. Lady Faulkland*[†], where the doubt arose on what was meant by a testator, (who having a reversion in fee expectant upon an estate in tail male in himself and his heirs, in part of his lands, and which would take effect in possession if he had not a son, and having a fee-simple in other parts of his estate), after other devises, devised "all other his lands, tenements and hereditaments out of settlement," and then died without issue. And letters of the testator, and other evidence of his declarations and discourse were offered to prove what was the testator's intention by these words, "all other, &c. out of settlement." But it was agreed[‡], that this kind of evidence could not be admitted; for, where a will was doubtful and uncertain, it must receive its construction from the words of the will itself, and no parol proof or declaration ought to be admitted out of the will to ascertain

* And see *Bromley v. land*, 3 Chan. Rep. 98; and *Jeffries*, Prec. Chan. 138. see 1 Ves. 231.

[†] *Strode v. Lady Faulk-* [‡] 3 Chan. Rep. 94.

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Parol declarations respecting devisee.

it; for, if it might, then marriage settlements or purchases might be defeated twenty years after they were made, by such parol proof started up^h.

Secondly, respecting the person of the devisee. It was held in *Brett v. Rigden's* case¹, that a testator's saying to *T. B.* (to whose father he had devised all the lands and tenements in question; but who died during the life of the testator), that he (*T. B.*) should be his heir, and should have all the lands and tenements which *H. B.* his father should have had by the testator's last will, if he had survived the devisor, was of no effect in law, and that no regard ought to be paid to it, inasmuch as it was not written in his will; for the statutes of 32 and 34 Hen. 8, gave liberty and authority to every one to devise his lands by his last will and testament in writing. In which case, all that could make a devise effectual, ought to be in writing; and if that which was in writing, was not sufficient to make the lands pass without the words spoken to *T. B.* the son, then it followed that the substantial matter which should make the land pass was not written, but rested in words only, and was not within the statute, which no will but a will in writing was: which was as much as to say, that all that was effectual and to the purpose must be in writing, without seeking aid of words not written. So in the case of *Starling v. Elrick*, before mentioned, in order to show that the testator, by the words "right heirs male" meant heir male apparent, evidence was offered of parol discourses and declarations of the testator to the manner in which he intended to settle or had settled his estate; and that he had often declared, that he would settle his estate, so that if *R. S.* died, his nephew *S. S.* should have it. But the Lord Keeper was of opinion, that it would be of fatal consequence to

^h And see *Bennet v. Davis*, 345; 3d Resol. 10 Eliz.; and
² *P. Wms.* 316; *Parsons v. Fuller v. Fuller*, Cro.
Lance, 1 Ves. 189, 1748. Eliz. 422; S. L. as to tenant
¹ *Brett v. Rigden*, Plowd. in tail.

admit examinations of this kind, to carry estates contrary to the words of a will, and to what, by law they did import; and he refused to admit an examination to these matters.

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As, in analogy to the rules of law respecting deeds^k, with regard to that part of them which consists of construction of law, no parol declarations respecting wills are admitted to explain, enlarge, contract or rescind the language used, the construction being the proper business of the Judge, and restrained to arise out of the instrument alone; so, in analogy to the law respecting deeds, as to that part of them that consists of matter of fact, the law respecting wills as to the same part, admits of averment by the party, where the matter averred stands with the words of the will. Thus, if A. levy a fine to W. his son, to have and to hold to him and his heirs: upon this fine, the court cannot make question for any matter of law; but the party may come and aver matter of fact, and say that A. had two sons named W. an elder and a younger, and his intent was to levy the fine to W. the younger. This averment out of the fine is good, of this matter of fact, which well stands with the words of the fine, and may be tried by the country^l. So, if a man levy a fine of the manor of S. or of the manor of D. and, in truth, there is a manor of North S. and South S. or Great D. and Little D.; in this case, issue may be taken *dehors* which manor the donor intended to pass; for that is matter of fact not apparent in the fine, whereof the court cannot take cognizance; but it stands well with the fine, and shall be tried by the jury^m. But if a man, by deed, make a gift to one of the sons of J. S. who has divers sons, or if the words in the limitation of the estate were to one and his heirs; in the former case, he cannot aver which son he intended, because, by judgment in law, this gift is void for uncertainty upon the face of it, which cannot be supplied by averment; nor can an averment be made in the latter

Parol evidence respecting the construction of devise.

^k See 2 Show. 65.

^l See 8 Rep. 155.

^m 8 Rep. 155; Keilw. 49, pl. 6.

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case, that the intent of the parties was that the feoffee should have but an estate to him and the heirs of his body; for such averment would be against the judgment of the law, which appears to the court upon the view of the deed. And upon exactly the same principles, it is held, that if a man has two sons, both called by the name of John, and conceiving that the elder, who had been long absent, is dead, devise his land, by his will in writing, to his son John generally, and, in truth, the elder is living, in this case, the younger son may, in pleading or in evidence, allege the devise to him, and, if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he, at the time of the will made, named his son John, the younger; and the writer left out the addition of the younger, for, Lord Coke says, no inconvenience can arise, if an averment in such case be taken, in case of a devise by will, because he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment: for, when he sees the devise to his son John, he ought, at his peril, to inquire, which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent^a. And the law would be the same, if there were two persons both named *J. S. of Dale*; and one devised the land to *J. S. of Dale*; parol evidence would be admitted, in such case, to prove which *J. S. of Dale* was intended by the testator^o. And the rule would apply with equal force, if the ambiguity arose from there being two manors or two estates of the same description; for, in all these cases, the variance is in matter of fact, which lies in averment^p.

So, where *B.* seised in fee of a real estate, as heir on the part of his mother's mother, and being also seised in fee of a very small estate, as heir to his own father, devised

^a *Cheney's case*, 5 Rep. 58, b; and see 2 P. Wms. 137.

^o See 2 P. Wms. 137.

^p 1 Ves. 231.

all these lands to trustees and their heirs, in trust to pay several annuities and charities, after payment of which, he devised the residue of the rents and profits of the estates to his own right heirs of his mother's side for ever¹; the question was, who should be entitled to the residue of the rents and profits, whether the heir of the mother's father or the heir of the mother's mother? and it was insisted, that parol proof should be read as explanatory of the testator's intention. It was objected that, in the case of land, where the statute required that the will should be in writing, there ought not to be any parol proof. But *per* King, Chancellor, in this case, parol evidence of what the testator said or directed, when he ordered the will to be made, might be admitted by analogy to the cases where there were two persons of the same name, or the like; for here, there were two heirs of the mother's side, one who was heir of the mother's father, and the other heir of the mother's mother, consequently, the court might well admit parol evidence to show which heir of the mother's side was intended. And the depositions of two witnesses were accordingly read. Again, where *D.* by her will gave two legacies, one of 100*l.* the other of 300*l.* in this manner; "I give, direct, limit and appoint 100*l.* other part of the said trust-money, to the four children of my late cousin *E. B.* within six months after my decease, equally to be divided between them; and if any or either of them should happen to die under twenty-one, or unmarried, their share or shares shall go to the survivors of them²." At the time of making the will, the situation of *E. B.* was this; by a former husband *P.* she had two children; by a late husband *B.* she had four children. All the children were living at the death of the testatrix. Parol evidence was offered to show that the testatrix meant the four children by *B.* This was objected to on the ground that the admit-

¹ *Harris v. Bishop of Lincoln*, 2 P. Wms. 316.

² *Hamshire v. Pierce*, 2 Ves. 216.

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tance of parol evidence had been confined to cases where there were two persons or things of the same name, and could not be carried further. But *per Curiam*, wherever there are several persons or things of the same name or kind, and, from thence, it becomes doubtful and ambiguous which the testator meant, and unless some reasonable light is let in to determine that, the will must fall to the ground, parol evidence may be admitted: as where there are two sons of the same name; for when admitted in such case, it is not to contradict the words of the will, but to let in light so far as is agreeable to the words to enable the court to support the act done. Upon the same principle, here is a proper ground to admit an explanation of this fact, which were the four children meant; for, that does not contradict the will, but determines which of the four children were to have that benefit. Accordingly, parol evidence was admitted, that the testatrix declared she had provided for Mrs. B.'s four children; which showed plainly, that she meant the four children of Mr. B. those he had by his wife, which explained what she meant by the four children. And it was proved also, that she put a negative on the other two, saying, "that she would not give to the others, being the P.'s, any thing, because their own father had given them a good fortune.

And, if words of an equivocal sense be used, a parol averment will be received to direct the application of them. Thus, where one made his will, giving 500*l.* to the charity-school, and several pecuniary legacies to his poor relations, and died; and there was a free-school which was a charity-school, and also a charity-school by subscription; the question being, to which this bequest was intended? it was held, that it was intended for the latter, upon the proof that the testator took great delight therein, and had declared he would leave them something at his death.

* *Attorney General v. Hudson*, 1 P. Wms: 674.

So, where a testator makes use of a general term, as the word "relations," a parol averment to establish the fact, that he knew particular persons standing in that capacity were living, is admissible, but it cannot be carried one jot further. It must not be used to prove instructions of the testator after the will was reduced into writing, nor as a declaration of who was meant by the written words of the will. And though this is a nice distinction, yet it is a distinction in the reason of the thing; because no mischief can arise from admitting it. Thus, in the case of *Goodinge v. Goodinge*¹, where a man devised a legacy to such of his nearest relations, as his executors should think poor, and objects of charity. Evidence was offered to be read of the testator's intention not to confine the term "relations" to the rule of the statute of distributions; but Lord Hardwicke would not suffer it to be read for that purpose: then evidence was offered of the testator's having poor relations in Salop, and that he knew thereof, and Lord Hardwicke admitted it to be read to establish that fact, but to go no further, taking the distinction above mentioned. And it being read, his Lordship accordingly said that it signified nothing; for, that these relations in Salop could not be let in without rejecting the word nearest.

And from the particular nature of the instrument, averments respecting devises are more favoured than averments respecting deeds; for, in the latter case, if the demonstration of the persons by name be mistaken, though, as to description they be right, the deeds will be void². As if one grant land to J. S. son and heir of G. S. and it be true that he is son and heir to G. S. but his name be T. S. this is a void grant. But in the case of a devise, all that is necessary is to show that the person intended is described. And therefore, where a testator, by his will, gave an equal share of his real estate to his two sons, James and Charles, and

¹ *Goodinge v. Goodinge*, 1 Ves. 231.

² Bac. Max. 107; but see 11 Rep. 21, a.

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it was urged that the devise was not good, because the testator had mistaken the devisees names (who were his illegitimate children) and they consequently could not take²; Lord Hardwicke said, that the law was otherwise; for, if a man was mistaken in a devise, yet if a person was clearly made out by averment to be the person meant, and there could be no other to whom it might be applied, the devise to him was good. So where a testator described a legatee by a wrong name which she never bore, parol evidence was allowed by the Master of the Rolls to show that the testator knew such a person, and used to call her by a nick-name³. And, where a devise was to a son by name, and his christian name was mistaken, but it was added, in the service of the Duke of Savoy; parol evidence was admitted to ascertain the son in the service of the Duke of Savoy, and this son, though his name was mistaken, had the estate². Again, where a testator gave the residue of his estate to the poor of the parish of *K.* in the county of *L.* and it appeared that this parish of *K.* was not in the county of *L.* but in the county of *N.* the Master of the Rolls was of opinion, that parol evidence ought to be admitted to help out the description of the parish, and that this was a settled rule².

But, if the person to take be not in some sort described in the devise, no averment will be admitted to show who was intended; because, in such case, the ambiguity appears on the face of the instrument. Thus, Sir John Strange, Master of the Rolls, in citing a case where the executor constituted in a will was, "my nephew Robert New," and in the engrossing they had made it "Nune," and parol

² *Rivers's case*, 1 Atk. 410; *Pitcairne v. Brace*, Finch, 403; *Gynes v. Kemsley*, 1 Freem. 293; see 2 P. Wms. 142; and note distinction between devise and testament.

³ Cited by Lord Hardwicke, in the last mentioned

case; and same *per* same, 2 Atk. 240.

² Cited *per* Lord Macclesfield, Chan. 8 Vin. Abr. 197, pl. 33; 2 Eq. Ca. Abr. 415, pl. 6

² *Brown v. Langley*, 2 Eq. Ca. Abr. 416, pl. 14.

evidence was admitted, and thereupon New was declared the person meant, observed, that this would hardly have done, if it had not have been for the relative words "my nephew," and its appearing that New was his nephew, and that he had no such nephew as Robert Nune^b. Again, where a testator had made dispositions in his will to several, and but two women were mentioned throughout the whole will, viz. his wife and his niece, and, in the latter part of the will, a particular estate was devised to "her" for and during her natural life^c; the question was, whether parol evidence should be admitted to show to which of the two women "her" referred? But the Lord Chancellor would not receive it, thinking the offering it was an attempt contrary to the principles of the court; because it would tend to put it in the power of witnesses to make wills for testators.

And it seems, that no averment will give words, used in a will, a different sense from that which they obviously carry on the face of the instrument. Thus, though the word "son" is applicable to a grandson as well as to a son, if there be no son in being; yet where the word son in a will appeared clearly, from the context, to be applicable to a son only, and not to a grandson, because both son and grandson were named in the instrument, no parol averment could be admitted to explain it otherwise; because that would have been to contradict the written will by evidence *dehors*. The case of *Steed v. Berrier*, cited in a subsequent part of this work, seems fully to justify this conclusion.

Nor will the court, by averment, supply any thing that is not before written. Thus, where 200 *l.* were given under the will of *L.* to the ward of Bread-street, according to Mr. — his will. On a bill filed for the direction of the court, as to the application of this charity, evidence was offered to show whose name was intended to fill this

^b 2 Ves. 217, 218.

^c *Castleton v. Turner*, cited
2 Ves. 216, 217.

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Averments respecting the interest of the devisee in the thing devised.

blank ; but Lord Hardwicke said, that he did not remember any case wherein the court had gone so far as to allow parol evidence of the intention of a testator where there was only a blank, and therefore would not permit it to be read ^d.

Courts of law and equity have also carried this rule, as to receiving averments of facts *dehors* the will, still further ; for although we have hitherto only seen it in instances where the ambiguity has been, either as to the person of the devisee or as to the subject matter devised ; we shall now advert to cases where courts have availed themselves of the benefit of such averments, in order to give a construction to words of equivocal import expressive of the quantity of interest, or of the extent of the subject matter of the devise ; distinguishing between cases where the evidence squares with and those where it contradicts the language of wills. Thus where one devised to J. S. his whole estate, paying his debts and legacies ; and died possessed of goods and chattels to the value of 5*l.* only, and seised in fee of divers lands, and was indebted 40*l.* at the time of his death. And the question was, whether the fee-simple of the lands passed by the devise ? And Rolle, Chief Justice, on the second argument, held, that the lands did pass ; for so he said the common understanding imports, and the words did go to the value of the estate^e. First, it comprehended the thing, to wit, the land. Secondly, the extent of the estate given, viz. fee-simple ; and so it should be here intended, and the words “ paying his debts and legacies ” did enforce this construction ; for they were to be paid presently, which could not be if the lands passed not in fee, and so the averment was but to supply the meaning of the testator, and stood very well with the will ; and Jerman, Nicholas and Ash, Justices, were of the same

^d *Baylis et al. v. Attorney General*, 2 Atk. 240.

^e *Kirman v. Johnson*, Styles, 281, 293, 1651.

opinion. So, in the case of *Moor v. Price*^f, which was an issue out of Chancery on a *devastavit vel non*, the question was, whether a devise to *P.* "of all the testator's estate, paying 400*l.* a piece to his sisters," carried his land? And, it appearing that the personal estate was not sufficient to satisfy the legacies, it was held that his real estate must have been intended to pass. And the preceding case of *Kirman v. Johnson* was relied upon, in which it was said to have been resolved, that this was no averment *dehors* the will, but was consistent with and explanatory of it.

And the value of the thing devised may be ascertained by averments, in order to throw light upon the meaning of equivocal language. Thus, where *A.* being seised of 10*l.* per annum lands in possession, and the reversion of 34*l.* per annum more expectant upon an estate for life, devised a legacy of 20*l.* to *B.* to be paid in twelve months out of his lands, and devised 50*l.* to *C.* to be paid in two years, and 50*l.* to *D.* to be paid in like manner out of his lands, and, having two sons, *W.* and *R.* devised ALL his LANDS to *R.* And one question was, whether *R.* took a fee? And it was contended, and so held by the court, that he did; because it did appear that the sum to be paid was more than the profits of the land would amount unto, by the time the money became payable; for the land in possession was but 10*l.* per annum, and 20*l.* were to be paid in a twelvemonth, and the court could not supply a supposition that the 34*l.* a year in reversion might fall in, that being a very foreign intendment^g. So where one devised all his personal estate to his wife for life, and what she had left at the time of her death, it was his will, and he did desire her that it might be equally distributed between his own kindred and hers^h. The question

^f *Moor v. Price*, 3 Keb. 49, 1673.

^g *Reak v. Lea*, 1 Freem. 479, Trin. 1679; S.C. 2 Eq. Ca. Abr. 298, pl. 2; and see 2 Burr. 1898, value of the

estate considered as an argument to show it was meant to pass in fee.

^h *Cowper v. Williams*, Prec. Chan. 71, 1697.

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was, what interest the wife had? It was contended that she had but the use of the personal estate during life, and that the words "what she had left" should be understood to apply only to perishable goods. But, on the other hand, it was urged, that the estate left was so small that the wife could not live upon it without spending the stock. *Et per Curiam*, if that be so, it may alter the case; therefore let the Master state the value of the personal estate, and then the court will give further directions. And a similar reference to the Master was made in the case of *Purse v. Snaplin*¹.

And, where the question was, whether one could take as a creditor under articles, and also as a legatee under a will, it was urged that the legacy was of equal value with the whole personal estate, and, consequently, if allowed, would defeat the intentions of the testator, of giving any thing to other legatees^k: Lord Hardwicke said, that this legacy being so near in value to the personal estate, he would do what Lord Jeffries and Lord Cowper had done in such a case, direct an account to be taken of the value of the personal estate at the testator's death, and at the making the will, which fact might give some light as to the intent, and was a fact necessary to be known before he determined the case. And in the case of *Fonnereau v. Pointz*^l, in which case most of the adjudications upon this question were cited and considered by the court, the decision was conformable to the foregoing principles, namely, the general admission of any averments respecting facts, that may throw a light upon obscure and ambiguous words of equivocal import; and that the state of the testatrix's fortune is applicable to the purpose of such an explanation.

Hence, the true principle of parol averments, as applied to wills, is, that nothing can, by parol evidence or averment, be put upon a will that does not previously stand

¹ 1 Atk. 414.

Colville, Rep. temp. Talbot,

^k *King v. Philips*, 1 Ves. 202.

232; and see *Stapleton v.* ^l 1 Bro. Chan. Rep. 472.

there, but that any light may be thrown upon what stands there by averments of all distinct facts that stand well with, and have their existence independent of the effect or non-effect of the words of the will; for, none of the mischiefs which were intended to be prevented by the statutes of wills or frauds that required these dispositions to be in writing, were to be apprehended from this species of evidence; therefore, in such cases, the courts, from the time of those statutes to the present, have been satisfied if the letter of them was complied with; that is, if the devise or bequest be in writing, and stands clear of all parol declarations of intention or inference of intention from parol declarations.

But, no fact that does not stand well with the words of the will can be admitted; because every devise or bequest must be in writing, and whether a parol averment enlarge or restrain the words of a will, they contradict it, and doing so, if the will, as explained by such fact, stood, the whole will would not be in writing. Thus, where *A.* devised particular lands to his executors, to be sold for payment of all his proper debts, and gave direction to the person who drew the will, to give all his personal estate to his executors, but, by mistake, that was omitted, though proved by the person who drew the will; Lord Harcourt, Chancellor, decreed the executors to account for the personal estate, saying he must construe the intent of the testator out of the words of the will, and not upon parol evidence; and he distinguished between this case, where the parol evidence was to control the common law and give the personal estate to the executor, which was assets at common law to pay debts, and those where the evidence went in support of the common law^m. Again, where *A.* being possessed of a considerable personal estate, made his will, and thereby devised several legacies, but gave none to his executor; the question was, whether parol evidence ought to be admitted, to prove that the testator did not intend that the

No averments
put in support
of the intent.

^m *Gale v. Crofts*, 8 Vin. Abr. 195, pl. 25; 2 Eq. Ca. Abr 415, pl. 5.

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executor should have the residue of his personal estate, but that the same should go according to the statute of distributions? And it was held clearly that no such evidence could be admitted; for, that this would not be to admit evidence to oust an implication, but was to admit evidence to contradict the rule of law, and what appeared on the face of a will ^a.

Parol declarations even of a testator are likewise received in all cases to rebut the constructive declarations of a trust put on words contrary to the legal sense of them, which is rebutting an equity; for in such cases, the estate is in the devisee, and the averment is in support of the letter of the will. This point seems to have been first agitated in the case of *Crompton v. North*, where lands were devised to the executor, to be disposed of for payment of debts and legacies; and the question was, whether the residue was a trust for the benefit of the heir at law? And one question made by the Lord Keeper and Mr. Baron Wyndham was, if it were a trust, whether an averment did not lie for the executor and trustee, it being an implied trust, and not within the statute of Hen. 8, of wills; and the court declared, that the estate being vested in the devisee, he should have been admitted to his proof of the testatrix's parol declaration, if it had been wanting and necessary, which it was not^o. So, where one devised certain lands to his son, and all the rest and residue of his real estate to his wife and her heirs, to the intent to pay his debts and legacies; on a bill by the heir to have the surplus, the Lord Chancellor allowed evidence to be read to show that the testator's intent was, that his son should have no more than what was expressly given him; and that the reason of the testator's giving his wife so much was, because that the testator talked with the witness about the settlement of his

^a *Osborne v. Villers*, 2 Bac. and see S. C. at large, cited Abr. 426. by Hutchins, one of the lords

^o *North v. Crompton*, 1 commissioners, 2 Vern. 253. Ch. Ca. 196; 22, 23 Car. 2;

affairs, telling him he designed his heir the same lands which were given him by the will, and that he did design other lands for his younger son; whereupon the witness said, that would be the means to set the two sons at difference, and therefore he had better give them to the wife, and depend upon her generosity to the younger son, which advice he approved of and followed; and his Lordship said, that such evidence may be read to explain any implication, notwithstanding that matter *dehors* ought not to be averred^p.

Upon the same principle of the evidence not being contradictory to the will, it has been held, that parol proof may be brought to show that a devise is meant as a performance of a preceding agreement; for, in such case, the evidence is not made use of to construe the will, but to explain whether the one thing is a satisfaction for the other. Thus, where *J. M.* agreed to settle 100 *l.* per annum on his intended wife, but, finding himself ill, made his will, and left her 100 *l.* per annum, and then, *J. M.* recovering, the marriage was soon after had, and the settlement carried into execution. After *J. M.*'s death, the widow distrained for 200 *l.* a year against the devisee of the estate, who brought a bill to oblige her to take but 100 *l.* per annum^q. Upon the hearing, it was insisted that the testator intended the wife but 100 *l.* a year; and that its being by two different instruments arose only from the change of circumstances; and, to prove this, parol evidence was offered. *Et per* Baron Clarke, it is proper to be read. The question is, whether here are not two provisions made for the same thing? It is impossible to come at the facts by which the court is to judge, but by their being made out by evidence, nor can the party's intent be otherwise proved.

Averments of performance of agreement.

And parol evidence may be admitted in all cases to counteract fraud; because to decide otherwise would be to make

Averments admitted to counteract fraud.

^p *Docksey v. Docksey*, 2 Eq. Ca. Abr. 506.

^q *Mascal v. Mascal*, 1 Ves. 323.

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the rule instrumental in encouraging that, which it is its object to prevent. Thus, where *L.* made his will, and *A.* his brother, executor, and devised to him his real estate, and thereby willed that his executor, out of his rents in arrear and other his personal estate, and out of half a year's rents and profits of his real estate, after his death, should pay his debts and legacies thereafter mentioned : and by his will, amongst other legacies, devised 40 *l.* per annum to his wife's nephew to maintain him at Cambridge, to be paid by his brother and executor. The testator dying, the executor alleged he had fully administered the personal estate, and the half year's profit of the real estate, and refused to pay the 40 *l.* per annum. But, though the will had made only one half year's rents and profits of the real estate liable, yet it being proved by one witness, that the executor had promised the testator that he would pay the annuity, and that otherwise the testator would have charged his real estate therewith, it was decreed for the annuitant^r. It is, however, an essential circumstance to any relief under this head, that it should be an accident perfectly distinct from the sense of the instrument.

Devise void if testator's intent be contrary to law.

A devise may fail of taking effect, by reason that the intent of the testator in his will does not agree with the rules of law, for such intent shall be void. As if a man devise lands to *A.* in fee, and if he die without heir, that *B.* shall have the land, this devise to *B.* is void, for one fee-simple cannot depend upon another^r.

And if in the writing of a will, the testator's instructions be not followed, the devise will be void. Thus, where *D.* gave instructions to have his will in writing made, and ordered his land to be given to one of his sons for life, and the clerk who wrote it gave an estate in fee; the Court, except Fenner, agreed that the will was altogether void, because it was not the will of the testator. But Fenner

^r *Oldham v. Litchford*, 2 Vern. 506. ^r 1 Bulstr. 6, pl. 3.

thought, "that, forasmuch as the testator intended, to give an estate for life," this should be considered as his will: but all the other Judges were against him in opinion. But, if that which is contrary to the intent of the testator can be separated from that which is agreeable to his intent, it seems, in such case, the former only will be void. As if one be directed to devise lands to the testator's wife, and, in preparing the will, he insert of his own head a condition, *scilicet*, that the wife shall be chaste; this condition, though standing upon the face of the will, if unknown to the testator, will be void, and the devise absolute¹.

A devise may also fail of operation, by doing that which the law would effect without any devise, it being a principle of law that a man cannot give another what he has already, for when he does so, *nihil operatur*. Thus, if the tenant in tail enfeoff the donor, it is no discontinuance. Upon the same principle, if a testator devise "that his land shall descend to his son," the devise is utterly void and idle, and the devisee shall be in by descent². So, if a man devise lands to a person that is his next heir and his heirs, the devise is void, and the heirs shall take by descent³. Again, if there be *A.* tenant for life, remainder to *B.* his son in tail male, remainder to *A.* and the heirs male of his body, remainder to *A.* in fee; and *A.* having another son *C.* devise his remainder, after the death of *B.* without issue, to *C.* his second son in tail male; this devise can never take effect, and therefore is void; because the estate-tail in the father will descend at the same time, and take place of the estate-tail devised, and then the devisee

Devise may fail of taking effect by giving what the law would give without it.

¹ See *Sir Richard Perhall's* case, cited 1 Leon. 113.

² *Dyer*, 12, pl. 54; *Couden v. Clerke*, Hob. 29; *Godolphin v. Abingdon*, 2 Atk. 57; *Jenk. Cent.* 248.

³ *Dyer*, 124, pl. 38, and 354, pl. 33; *Plowd.* 545;

1 Rol. Abr. 626, J. 1; Cro. Eliz. 833; Vaugh. 271; S. L. of a copyhold, see *Smith v. Triggs*, 1 Strange, 487; and *Hurst v. Earl Winchelsea*, 2 Burr. 880; S. C. 1 Blac. Rep. 187, as to appointment by will.

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will take the old entail by descent, which will exclude the new estate limited by the will; because the will gives no more nor otherwise than the devisee would have taken by the entail, as is apparent by the comparison of the descents; for the estate-tail devised expires *equis passibus* with the estate-tail in *A.* the father.¹ But if, in the preceding case, the reversion expectant upon the determination of the estates-tail had been in *A.* the devisor instead of a remainder, the devise to *C.* his second son in tail had been good, though it could never by any possibility have taken effect in possession; because, in that case, tenant in tail would have held of him in reversion, and he of the chief lord; and, consequently, the devisee of the reversioner would have been entitled by the devise to the services which tenant in tail is to perform during the continuance of the estate-tail, and which would otherwise descend to the heir general of the testator. So that the effect of the will would then be, that *B.* would from thenceforth hold of *C.* instead of holding of *A.* and *C.* would hold of the chief lord, and the lord should avow upon *C.* *modo et forma predictis.* So that the will, in such case, would take effect by creating a seignory and tenancy, though it could never take effect in possession ²(1).

¹ See *Cholmley's case*, 2 Rep. 51, a, and 1 Ld. Raym. 344. 523, 527; Salk. 233; Com. 62.

² See Yelv. 149; Moore,

(1) This rule, that the devisee shall be in of the elder title, viz. by descent, has been said by some to have been adopted in favour of the heir, that he might be in of his better title, and thereby toll an entry or have a warranty. But if that were the case, he would be entitled to an election to take either under the will or under the devise, as might be most for his advantage; but that he cannot do. The rule seems rather to have been adopted in favour of third persons, viz. of the lord, for the preservation of the tenure, (which was a valuable thing before the statute of Malbridge) and of creditors for the preservation of their debts. Vid. Styles, 148.

And the alteration of an estate in reversion, which the law casts on the heir, into an estate in remainder which is given by a devise, is not a difference in point of estate, between what the law directs and what the devise directs; in such case, all the difference is in the manner how and time when the heir shall come to the estate. And therefore, if a man devise land to his wife for life, the remainder to *J. S.* (he being the devisor's next heir) in fee, this devise is void, and he shall be in, after the death of the wife, by descent, which is the more worthy and elder title, and not by purchase by way of remainder^a.

So if the limitation in fee to the heir by devise be after an estate-tail, the devise will be void in point of limitation, and the heir will take by descent and not by the will. Thus, where *H.* had three sons, *A. B.* and *C.* and devised lands to *B.* his second son, after the death of his wife, to hold to him and his heirs for ever; and for want of such heirs, then to his own right heirs^b. *H.* died, and *B.* entered, and died without issue, living the eldest son; and it was held, first, that the second son had only an estate-tail, because the word 'heirs' here could import nothing more than issue, for *B.* could not die without heirs living of the father. Secondly, That the eldest son took by descent and not by the will, and the devise over was void in point of limitation; for the devisor's intent was, that the lands should descend from himself, and not from his son *B.*

And a devise of an estate for life to the heir at law will, if no farther disposition be made thereof, be void; because the fee-simple which descends upon him drowns the particular estate for life^c. Thus, where a man had issue two daughters by several women, and being seised of lands in fee, devised that his wife should have the moiety of his

^a *Preston v. Holmes*, Styl. 148; 1 Rol. Abr. 626, J. 2; and *Bashpool's case*, 2 Leon. 101; 3 Ibid. 118; S. C. 4 Ibid. 35.

^b *Nottingham v. Jennings*, 1 Salk. 234; S. C. Comyns, 82; 1 P. Wms. 23.

^c 3 Leon. 26.

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lands for years, and his eldest daughter, at the day of her marriage, should enter into the other moiety. His eldest daughter married, and died without issue. And the question was, whether her uncle, as heir at law, should have that moiety, or the fourth part of the whole land? And this depended upon what interest the elder daughter took by the devise. And it was held, that when the devise was made to the eldest daughter, that she might enter after certain years, the inheritance, notwithstanding, passed into the daughters presently; they were entitled to enter in common as one heir to their father until the marriage; and then, there being no words of limitation of any estate that the eldest daughter should have after the marriage, she could have but an estate for life, which, as to a moiety of the moiety, was void, being merged in the fee that descended; and, as to the other moiety of the moiety, did not remove the inheritance which was once settled in them as coparceners. Consequently, the uncle should have but the moiety of the moiety, viz. that part which descended to the eldest daughter, and merged the estate for life devised, and the other sister should have the other moiety of the moiety of the land which passed into her presently, subject to her sister's estate for life; and so of the moiety devised to the mother for years when it fell in^d.

And it is held, that charging the estate devised to the heir at law with money to be paid to younger children, is not such an alteration of the estate as will make the heir take by purchase. Thus, where *P.* seised of lands in fee devised all his estate to his eldest son, to hold to him and to his heirs, upon condition he should pay to his other children the sums thereby appointed unto them, according to the intent of his will; and if he refused payment of any of the said sum or sums of money, then that the said other children should have it to them and their heirs; it was held, that the first devise to the son and his heirs in fee,

^d 3 Leon. 25.

being no more than what the law gave, was void^e; for it would be mischievous if every little legacy should alter the course of descent, and thereupon the heir might plead to the obligation of his ancestor, *riens per discent*^f. So, where a father devised his lands to his heir for payment of debts, the court held, that notwithstanding they were a charge on the land, yet the heir was in by descent, for the tenure was not altered^g. And where the father devised hereditaments to his son and heir in fee, but chargeable with debts, and an annuity or rent-charge payable to his widow; it was held, by Holt, Chief Justice, that these hereditaments descended to the son, and were assets, because whenever the devise conveys the same estate as the law would make by descent, and only charges it with encumbrances, the heir takes by descent, and not by purchase^h.

And the law will be the same, although, from the circumstances of the case, it will be most beneficial for the heir at law to take by the devise, and not by descent. Where, therefore, a man, seised of lands *a parte materna*, devised them to his executors, for payment of his debts, for sixteen years, and afterwards to one that was his heir *a parte materna*; the question was, whether he took by descent or by purchase under the will? And it was held, that the devise was void, and he should take by descent; it being no more than if the devisor had made a lease for sixteen years, and then devised the reversion to his heir; and it was said that the descent from him to the heir *a parte paterna* or *materna*, was only a consequence arising out of the nature of the estateⁱ.

An alteration as to the time of the heir's coming to the estate, we have seen, does not interfere with this principle;

^e *Haynsworth v. Pretty*, 1270; S. C. 1 Black. Rep. Cro. Eliz. 833, 919; S. C. 22.

Moore, 644.

^h *Emerson v. Inchbird*, 1

^f *Clarke v. Smith*, Comyns, Ld. Raym. 728.

72; S. C. 1 Salk. 241.

ⁱ *Hedger v. Rowe*, 3 Lev.

^g *Allam v. Heber*, Strange, 127.

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but wherever the devise makes an alteration of the limitation of the estate from that which takes place in the course of descent, there the principle ceases to operate, and, consequently, the heir takes by purchase^k. And therefore, if a man, having two daughters, being his heirs, devise his land to them and their heirs, and die, they shall have it as joint-tenants by devise, and not as coparceners by descent; because the devise gives it them in another degree than the common law would have given it them; for, by the common law, each of them would have had a distinct moiety, but by the devise they are joint-tenants, and the survivor shall have all^l. So, if a man have land in borough English, and also guildable lands, and devise all his lands to his two sons, and die, they shall take jointly, and the younger shall not have a distinct moiety in borough English, nor the elder in the guildable land, but they are both joint-tenants^m.

And the law would be the same if one, having several sons, and being seised of gavelkind lands, devised them to his sons, who were heirs by the custom; for, in such case, they would be joint-tenants by the devise, and the survivor should have the whole; whereas, if the lands had descended, they would have been in the nature of parcenersⁿ.

Nor would it have altered the case if the devise, in the three preceding cases, had been to the daughters or heirs, as tenants in common. Thus, where *T.* seised in fee of the lands in question, being of the nature of gavelkind, devised them to his heirs by the custom, and to their heirs, equally to be divided amongst them; the question was, whether they should be in by descent or devise? *Et per* Anderson, Chief Justice, let us consider the devise by

^k *Preston v. Holmes*; *Nottingham v. Jennings*; *Clarke v. Smith*; *Hedger v. Rowe*, *supra*. 36; *Gouldsb.* 141, pl. 53; 3 *Lev.* 127, 128.

^m *Per* Fenner, *Owen*, 65.

ⁿ See *Bear's case*, 1 *Leon.*

^l See *Cro. Eliz.* 431, pl. 112.

itself, without the words, "equally to be divided amongst them;" and I conceive they shall be in by the devise, for they are now joint-tenants, and the survivor shall have the whole; whereas, if the lands shall be holden in law to have descended, they should be parceners, and so, as it were, tenants in common; and although the words subsequent, "equally amongst them to be divided," makes them tenants in common, yet that doth not alter the case. And Wyndham and Rhodes, Justices, were of the same opinion°. So, if one, having two daughters, devise all to one, she shall take all by devise, and shall not take a moiety by descent as heir, and a moiety by the devise; for this is not a devise to an heir, because both coparceners make the heir, and the one is not an heir without the other; and there can be no such descent as the descent of a moiety to one coparcener as heir^p. Besides, if it were held, that one took a moiety by descent, it must be held, consequently, that the devise, as to a moiety, was void, and then the said moiety ought to descend to both, as heirs to the testator, and, consequently, the devisee would have but three-fourths of the lands, where they were devised to her *in toto*. This was determined in the case of *Reading v. Royston*^q. There, *H.* having two daughters, one of which had issue a son, and died, devised his land to the son and his heirs for ever. And the question being, whether the son should take all by the devise, or the one moiety by descent, and the other moiety by devise? it was resolved by the court, that the grandson should take all by the devise, and could not take a moiety by the descent, as heir, and a moiety by the devise.

And a devise so circumstanced may be good in part

° *Bear's case*, 1 Leon. 112; S. C. 315. 2 *Ld. Raym.* 829; and see 2 *Rol. Rep.* 352, and *Palmer*, 373; S. L. *per Doderidge*, *arguendo*.

^p *Co. Lit.* 163, b.

^q *Reading v. Royston*, 1 *Salk.* 242; S. C. *Comyns*, 123;

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and void in part, as to one entire thing. As, if a man devise one moiety of Blackacre to *B.* his heir in fee, and the other moiety to him in tail, the heir shall take the fee by descent, the devise as to that being void; and the other moiety he shall take in tail by the devise as a purchaser^r.

Devise void by
non-acceptance
of devisee.

And a devise may also fail of taking effect by reason of a waiver of the benefit thereof by the devisee, and such waiver may be either express or implied. An express waiver is where the devisee actually refuses to accept the thing devised. An implied waiver is where the devisee does an act, from whence it is inferred that he does not accept the benefit intended him under the will. Thus, it is a conclusion in equity, that wherever any person, having a claim upon a man's estate independent of him, and also a claim thereupon under his will, which claims are repugnant to each other, pursues the former, the latter is thereby waived or abandoned; for it being against the intention of the will that the devisee should have both, equity therefore considers such devise to be upon an implied condition, that the devisee shall abandon his original title, or shall waive his title by devise. The leading case upon this point, is that of *Noys v. Mordaunt*. There *E.* having two daughters, made his will, and devised to *M.* his eldest daughter, his lands in *B.* and 800 *l.* in money; to *N.* his second daughter, his lands in *S.* and *C.* and 1,300 *l.* in money, provided and on condition she released, conveyed and assured *B.* lands to her sister *M.*; and devised further, that if he should have a son, the devise to his daughters, and the lands at *S.* and *C.* should be void: and in that case he gave 1,200 *l.* to *M.* and 1,000 *l.* to *N.*; provided also, that if he should have another daughter, then he gave the 800 *l.* devised to *M.* to such after-born daughter, and the 1,300 *l.* devised to *N.* to her and such after-born daughter equally between them. The testator soon afterwards died, leaving his wife *enseint*

^r See 2 Lord Raym. 830.

of a daughter, *E.*, *M.* married *H.* and died without issue, not having given any release to *N.* her sister, according to the will. *E.* claimed not only the lands devised to her by the will, and a moiety of what was devised to her sister *N.* but also a moiety of the *B.* lands devised to *M.* they having been, on the testator's marriage, *settled* on himself for life, and his wife for her jointure, remainder to the first and other sons, remainder, in default of issue male, to the heirs of his body*. And the question was, whether she should be at liberty to substantiate that claim, or whether she ought not to acquiesce in the will, or renounce any benefit thereby. *Et per* Lord Keeper, in all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee-simple lands, and to another lands entailed or under settlement, it is upon an implied condition, that each party acquit and release the other; especially, as in this case, where the testator plainly had the distribution of his whole estate under his consideration, and had given much more to *E.* than what belonged to her by the settlement, and had it in his power to have cut off the entail. In the preceding case, it is observable that the Lord Keeper dwells strongly upon the circumstance of its being an arrangement among the testator's children, by a total disposition of his property between them, and by which the devisee took a greater interest than she would have been entitled to under the settlement; and also, that the deviser was tenant in tail, and consequently might have barred the estate tail by fine or recovery. But these arguments were only used in corroboration of his opinion, the general principle being sufficient of itself to support the rule, had the case been stripped of these circumstances. Accordingly the rule is laid down by Lord Talbot, in the case of *Streatfield v. Streatfield*, on broader grounds; for his lordship there

* *Noys v. Mordaunt*, 2 Vern. 581; see 2 Ibid. 232, 233; Gilb. Eq. Rep. 15.

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states it thus: "When a man takes upon him to devise what he has no power over, upon a supposition that his will will be acquiesced under, the Court of Chancery will compel the devisee, if he will take advantage of the will, to take entirely, but not partially under it; there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition that the devisor has made." In that case¹, *T. S.* the grandfather of *J. T. S.* by articles previous to his marriage, agreed to settle lands in *S.* to the use of himself and his intended wife for their lives, and the life of the survivor, and after the survivor's decease to the use of the heirs of the body of *T. S.* on his wife begotten, with other remainders over. The marriage took place, and by deed, reciting the articles, *T. S.* settled lands in *S.* to the use of himself and his wife for their lives, and the life of the survivor, and after their decease to the heirs of the body of *T. S.* on *M.* begotten, remainder to the right heirs of *T. S.* They had issue one son, *J. S.* and two daughters. Upon the marriage of *J. S.* other lands of considerable value were settled by *T. S.* on him. *J. S.* died, and then *T. S.* levied a fine of the lands comprised in his own marriage settlement to the use of himself in fee, and made a will, and thereby devised part of those lands to his two daughters; "and all other his manors, messuages, lands, tenements and hereditaments whatsoever, either in possession, reversion or remainder, not therein before given or disposed of, situate in the counties of *H. S.* or elsewhere, he devised to trustees, in trust for *J. T. S.* his grandson for life, remainder to his first and other sons in tail male, remainder to his daughters in tail, remainder to the testator's own daughters, with remainders over, &c." And it being held that the settlement made in pursuance of the agreement on *T. S.* the grandfather's marriage, was not a proper execution thereof, the question was, whether the general devise to the grandson should be taken as a satisfaction for what he was entitled to under the articles;

¹ *Streatfield v. Streatfield*, Ca. T. Talbot, 176.

for then he must be put to his election, either to accept that settlement, or waive all benefit under the will? And Lord Talbot was of opinion, that the grandson could not claim both under the will and under the articles; for it was plain that the intent of the grandfather in levying the fine was, to have the absolute ownership of those lands in him, and under the apprehension that he had thereby given himself a power of disposing of them, he gave part thereof to his daughters: and it would be a very strained construction to say, that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles; then he must have looked upon himself as master of one part of them as well as of the other. And his lordship distinguished this case from cases where the question was, whether general words should ever pass lands so circumstanced, in the hands of the testator, as not to be capable of the limitation he makes by will; because here the testator had, at law, a power to dispose of the lands; though they might be affected with a trust in equity under the articles, yet that could not be supposed to lie in his cognizance, he having done an act to enable himself to dispose of them: nor could it be compared to the case of an express trust, and the trustee devising all his lands; for there the trustee could not be ignorant that the lands which he held in trust were not his own. Then, if the testator's intent was to pass these lands by the will, the question was, whether the devisee could take any advantage under one part of the will, unless he permitted the other part of it to take effect? And his lordship was of opinion, that upon the principle that governed in the case of *Noys v. Mordaunt*, he could not; for though what was given to the grandson in this case, was precarious, (nothing being given to him if he died before twenty-one, and if after, then but an estate for life), and he appeared before the court in the favour-

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able light of heir at law, yet this would not alter the case, because the estates which the testator had given him were undoubtedly in the testator's own power, and he had given them to trustees until his grandson attained twenty-one, and then had disposed of them in such a manner as that there never could be any undisposed residue to go to him as heir at law.

And the rule equally applies, whether the benefit under the will be immediate or consequential; for, though the effect in such cases is, that the devise operates as a satisfaction for the previous interest of the devisee, yet the principles by which satisfaction, strictly speaking, are governed, do not apply to cases of this kind; therefore it is not necessary that the thing given by devise should be of the same nature or of adequate value with the thing in lieu of which it is to be received. Where, therefore, by articles before marriage, an estate was agreed to be settled on husband for life, *sans* waste, remainder to the heirs male of his body, with power to raise portions for younger children, and a settlement was afterwards made (also before marriage) in pursuance of the articles, and observing the very words thereof; the husband levied a fine, declaring the uses to himself in fee, and afterwards, by his will, made a provision to trustees for payment of his son's debts, for which purpose he directed them to make a proposal to his creditors. And the question was, whether, if the son took the benefit of the devise for payment of debts, he could have the settlement rectified according to the intention of the articles? Lord Hardwicke was of opinion, that if the son submitted to and took a benefit under his father's will, he must be bound thereby; for what was applied for payment of his debts was for his benefit, and the same as if paid to himself; therefore, though he was entitled to relief, and to have the settlement rectified according to the true intent of the articles, he must make

his election, and could not have the benefit of both the articles and the will^a.

And where the will comprised both real and personal estate, and the land to which one child was entitled in tail was thereby given to another, and a personal legacy to the tenant in tail, Lord Talbot went so far as to infer an intent, that whomsoever took by that will should comply with the whole, and put the party to an election of the estate-tail, or the personal legacy².

But if the devisee be a creditor, and not a volunteer, this rule does not apply. As, where *D.* devised his lands in *R.* and elsewhere to trustees, in trust to sell to pay his debts, and being indebted in 8,000 *l.* to various creditors, 2,331 *l.* for rents and profits received after his first wife's death from an estate that then belonged to his eldest son, a question arose between him and the creditors, whether he ought to be let into a share of the assets devised for payment of debts, since the estate at *R.* was part of the lands devised for that purpose? and the eldest son opposed this estate's being made liable to them, in which he opposed his father's will. And it was said, that in case the son would take any advantage of the will, he ought to abide by the whole. But to this it was answered, and resolved, that as to the *R.* lands, taking it that the son had a specific lien thereupon, they were his own lands, and a court of equity would not compel any person to admit a testator's devise of lands, which were not his own but the creditors lands, because the debtor had by his will provided for payment of debts; for the creditor was entitled to come in upon the fund given by the testator for payment of debts, so that, as to the settled lands in *R.* the testator's devise was as much void as if he had devised any other part of his son's estate. And therefore this case was

^a *Roberts v. Kingsly*, 1 Ves. 238; and see *Heather v. Rider*, 1 Atk. 426. ² See 2 Ves. 14, 617; and *Herne v. Herne*, 2 Vern. 555.

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distinguishable from the cases where the son was a volunteer and not a creditor¹.

So where the will, by which the disposition raising the obligation to accept or waive all benefit under it is made, disposes of land to which the devisee has a preceding claim, but is not executed so as to pass it, the rule does not apply; for the foundation on which these cases rest is, that there is an implied condition in such a will, that those claiming benefit by it should suffer the whole to take effect, and then it must necessarily refer to the validity of the will; for where the court must make a construction by implication from the force of the instrument itself, viz. the will, it must see the will; and then, when the instrument is of such a nature as that it cannot be read as a will of real estate, not being executed in the manner necessary to reach that, it cannot be known or taken notice of by the court as at all affecting that kind of property; for this case differs from *Noys v. Mordaunt*, and the other cases on that head; for when the obligation arises from the insufficiency of the execution or invalidity of the will, there is no case where the legatee is obliged to make an election, for then there is no will of the land². So, suppose a man to devise a legacy, charged upon land, to his heir at law, and the land to another, and the will be not well executed according to the statute of frauds for the real estate, the court will not oblige the heir at law, upon accepting the legacy, to give up the land³.

But if there be an express clause annexed to a will, that a legatee, disputing the will, shall thereby forfeit all benefit under it, there a devisee, claiming under it, will not be entitled to any benefit if he oppose a part of it relating to land, although, as to that, it be an imperfect and invalid

¹ *Deg v. Deg*, 2 P. Wms. 412; and see *Clarke v. Vyse*, 2 Ves. 617.

² *Hearle v. Greenbank*, 1 Ves. 298.

³ *Per Lord Hardw.* 1 Ves. 307.

disposition; because the conditional clause (to prevent breaking in on the statute of frauds, and at the same time to attain natural justice, which requires such a construction, to be made, as that the intent of the testator should not be overturned) will be taken as annexed to the personal legacy, and then the court must consider every part of that, whether it be a matter relating to real estate or not; for the whole will, relating to personalty, must, in such case, be read, let it refer to what it will. Thus, where a free-man of London devised his real estate to his younger son B. and all his personal estate among his children, particularly 1,200 *l.* upon some contingencies to G. the daughter of his eldest son, adding this clause: "If any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute or controvert the whole or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the whole or any part thereof, or the codicils thereto belonging, or not comply with the whole, and all, and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as it relates to them severally, shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of the personal estate I die possessed of, revoking what I gave to them, I give to my residuary legatees." This instrument was attested in the common form, but it was not subscribed by the testator nor by any witnesses. G. by the death of her father, happened to become heir at law to her grandfather, and so entitled to whatever he left to descend, or ought to have descended from the invalidity of his disposition. And the question was, whether, on the general reasoning and foundation of the case of *Noys v. Mordaunt*, G. must not make her election, either to have the 1,200 *l.* or the land which happened to descend to her? or, to be more plain, whether, if she chose the real estate, she must not waive the legacy? and, *per Curiam*, G. ought not to

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take the benefit of this personal legacy without waiving any right to the lands descended; for the devise in this will amounts to the same as if the testator had annexed a condition to permit the younger son to enjoy the land. The reasonable construction is, that none of the devisees should receive any benefit by the will, unless they suffer the whole instrument to take effect, not having regard to the validity or force of it, according to the statute of frauds, but to the clauses and expressions used. This, then, being an express condition annexed to a personal legacy, G. cannot take both the legacy and the real estate^b.

And, if a man give a portion or legacy to a child, or other person, in lieu or satisfaction of a particular thing expressed, that shall not exclude him from another benefit, although the other benefit claimed be contrary to the will of the donor; for courts will not construe that, as meant in lieu of every thing else, which a testator has said is to be in lieu of a particular thing^c.

But no case upon this rule has as yet gone so far as to establish the proposition, that if a deviser in his will takes upon himself to dispose of an estate in which he has no interest, but which is absolutely another's, and in the same will gives a beneficial thing to the owner of such estate, the owner of the estate shall either waive the benefit of the devise, or renounce his estate; the foundation of the rule being a supposed misconception of the testator as to the situation of his own property. And, where the testator has property of his own to answer the description given in his will of that which he means to dispose of thereby, his devise will be construed as applicable to his own property of that description, and not to the property of another, though equally answering it. Both these points seem to have occurred in the case of *Timewell v. Perkins*^d, where it was so determined.

^b *Boughton v. Boughton*, 30. Oct. 30, 1750.

² Ves. 12.

^d *Timewell v. Perkins*, 2

^c See *East v. Cook*, 2 Ves. Atk. 103.

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And, in order to put a devisee to the alternative of either waiving his interest under a will, or foregoing his claim to some interest disposed of in it, to which he is previously entitled independently of the will, it must be clearly evinced that the devisee's taking both interests will defeat the general intent of the devisor. And, therefore, where one devised to his wife a legacy, and also in remainder the same estate out of which she demanded her dower; and, it was contended, she must either take totally under the will, or totally reject it. But Lord Hardwicke was of opinion she was entitled to dower, and also to the devise and legacies: and this upon the authority of the case of *Lawrence v. Lawrence*, which his lordship said was a case in point determined in the House of Lords, upon the circumstances at large, and not upon any one of them in particular. Besides, his lordship said, this case stood distinguished from that of *Noys v. Mordaunt*, upon the reason of the thing likewise; for, the claim there would have overturned the will in *toto*, but the widow here did not claim to overturn the will in *toto*, but claimed merely a temporary interest; and it was only taking out that excrescent interest for a time, and afterwards it would go on as the testator intended it*. So, in the case of *Ayres v. Willis*, where a man, by his will, taking no notice of his wife's right to dower, made a provision for her out of his personal estate by way of residue, Lord Hardwicke held, that the wife might claim her dower, for her doing so would not break in on the will; and his lordship said, the case was the stronger, as it was only a residue, which accidental benefit he might intend she should have as well as dower†.

A devise also may become void and fail of effect by a man's performing that, which it is the object of it to accomplish in his life-time. As, where a man intending to build a seat upon his estate, and having laid the foundation

Failure of a devise, by testator's performing his intent in his life-time.

* See 2 Vern. 365; 1 Lord 230; and see *Waller v. Raym.* 438. *Fuller*, 2 Eq. Ca. Abr. 301,

† *Ayres v. Willis*, 1 Ves. pl. 18.

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of it, made his will, and thereby devised land for raising portions for his younger children, and paying off his debts, and appointed that 400 *l.* should be laid out in perfecting the building of his house^s. It happened that he lived several years after the making of this will, and, in that time, expended upon his house above 400 *l.* He then died, leaving the above will and the house unfinished. The will was defective for passing lands, not being executed pursuant to the statute of frauds. And the question was, whether the heir at law ought to have the benefit of the 400 *l.* by the will appointed to be laid out on this house? And it was insisted on the part of the younger children, that he ought not, because the testator himself, after the making of this will, had expended above that sum on the house. And, upon this ground, the Lord Chancellor decreed against the heir at law, who was plaintiff in equity for this sum.

A devise of lands may also fail of effect in consequence of the statute 3 & 4 W. & M. c. 14, which recites that, “Whereas it is not reasonable or just, that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless it hath so often happened, that where several persons, having, by bonds or other specialties, bound themselves and their heirs, and having afterwards died seised in fee-simple of and in manors, messuages, lands, &c. or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same, or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, be it enacted, &c. that all wills and testaments, limitations, dispositions or appointments, of or concerning any manors, messuages, lands, tenements or hereditaments, or of any rent, profit, term or charge out of the same, whereof any person or

^s *Husbands v. Husbands*, 1 Vern. 95.

persons at the time of his, her or their decease, shall be seised in fee-simple, in possession, reversion or remainder, or have power to dispose of the same, by his, her or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her and their heirs, successors, executors, administrators, and assigns, and every of them,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect."

Before which statute, if an obligor devised his land, the devisee, selling or aliening it before action brought, was not liable to the obligee. This statute was therefore made to remedy the defect in the 13th of Eliz. c. 5, of fraudulent conveyances, and to extend the benefit of it to fraudulent devises. The general view of the statute being to prevent creditors from being defrauded of their debts, and to put all devises upon equal footing with the heir where lands descend upon him, it has, according to the known rule upon statutes meant to prevent frauds, received the most liberal construction^b.

And the statute being made merely for the sake of creditors, and not at all in favour of heirs at law, it has made no manner of alteration in the law, except as between the creditor and the devisee; as to the heir and devisee the law is the same as before. Therefore, if a bond creditor come upon real assets, he shall resort to the lands descended in the first place; for the heir is only entitled after all gifts are satisfied, and therefore is first liable to pay specialty debts¹. And a devisee is in the nature of a purchaser, who is always to be preferred to an heir at law, although in *rei veritate* the purchaser come to the land without any valuable consideration; for the consideration of the purchase is immaterial in such case^j. And, therefore, where a bill was brought to have satisfaction out of

^b See *Kynaston v. Clark*,
2 Atk. 205.

^j See *Harbart's case*, 3
Rep. 12, b.

¹ Per *Ld. Hard.* 2 Atk. 435.

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assets, both descended and devised, Lord Talbot directed, that if the personal estate were not sufficient, then an account was to be taken of assets descended upon the heir at law; and if that should be deficient, then an account was to be taken of the devised estate^{*}.

It is provided, by the 4th section of this statute, "That where there hath been or shall be any limitation or appointment, devise or disposition, for the raising or payment of any real or just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, other than the heir at law, according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force; and the same manors, messuages, lands, tenements and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her and their heirs, executors, administrators and assigns, for whom the same limitation, appointment, devise or disposition was made, and by his, her and their trustee or trustees, his, her and their executors, administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied; any thing to the contrary in that act contained notwithstanding."

On this clause it has been decided, that if, in a devise for payment of debts, any debt be excepted, so that the same is not for the payment of all the testator's debts generally, such case is not within the benefit of this proviso¹.

Revocation of a devise.

A devise may lastly become void, or fail of taking effect, by reason of an actual or constructive *revocation* of it in the life-time of the deviser.

^{*} *Pitt v. Raymond*, cited
2 Atk. 435.

¹ See Barnadiston's Rep.
304.

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In considering the doctrine of revocations, it will be proper to observe, first, upon the principles, nature and extent of revocations, as they stood at common law previous to the statute of frauds; and then how far it has been altered or affected by that statute. At common law, a devise of land might be revoked in two ways, viz. first, by a positive act of the deviser revoking the devise, which is an express revocation. Secondly, by some declaration or some equivocal act of the deviser, amounting, in law, to a revocation; or some act of his furnishing ground to presume that his intent to devise must be changed. These are called revocations in law.

Express revocations at common law might have been effected, first, by writing; as, by a subsequent will or codicil expressly revoking a preceding will. Secondly, by parol; as if one, having made his will in writing, and devised, his land to A. afterwards, being sick and on his death-bed, had declared that he did revoke his will, and A. should not have his lands given unto him by his will, or other like words, showing the deviser's intent to make an express revocation thereof: or, if speaking of his will, he had said, "I do revoke it, and bear witness thereof;" for these expressions would have evinced an immediate purpose to revoke^m. But words would not have effected a revocation unless clearly used *animo revocandi*, which must have been made evident by an express reference to the instrument to be revoked; and, therefore, where a deviser on his death-bed, because his devisee did not come to visit him, affirmed that she should not have any part of his lands or goods, not referring to his will expressly; this was held, *per Curiam*, unanimously, not to be a revocation of the will, being but by way of discourse, and not mentioning itⁿ. So, if the expressions were such as imported only an

Express revocation at common law.

^m Dyer, 310, pl. 81; 1 Rol. Abr. 615; Co. 1; see Cro. Jac. 115, pl. 2; and see Cro. Jac. 115, pl. 2, 497, pl. 3; Car. 51. and see Styles, 343, 418.

ⁿ *Sympson v. Kirton*, Cro. Jac. 115, pl. 2; and see Cro. Jac. 115, pl. 2, 497, pl. 3; Car. 51.

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intention to revoke in future, they would not have been a revocation of a will in writing of land°. As if one, saying that he had made his will, added, that it should not stand; or that he would alter it; these words would not have been a revocation, for they are words but *in futuro*, and a declaration what the speaker of them intends to do. But a distinction was taken between cases of the last mentioned kind of *verba in futuro*, referring to a future act, and similar words when they referred to a present resolution; and, therefore, although if a man said, I will revoke my will made at A., this was no present revocation, because it referred to a future act; yet, if a man said, *animo revocandi*, "my will made at A. shall not stand," that had been an immediate revocation; for it referred to a present resolution: in like manner, as if one said to another, "you shall have my land for three years," this would be a present lease^p. The law was the same if a deviser declared that he would alter or add to his will, and died before any alteration or addition made; the will would, nevertheless, stand^q.

Implied revocation at common law.

A revocation might, secondly, be effected by some declaration or equivocal act of the deviser, amounting, in law, to a revocation, or some act of his furnishing ground to presume that his intent to devise must be changed. As if one, who had made his will said, *animo testandi*, as on discourse respecting the speaker's will, that J. N. (who was his heir at law) should be his heir, that would have been a revocation of a devise to a stranger; for, in such case, the testator's intent to revoke was a necessary inference from his intent that his heir at law should inherit, since the latter could not take place without the former was effectuated: and no further act was necessary to enable J. N. to take; because, when the will was revoked, the law gave the land to the heir^r.

° *Cranwell v. Sanders*, Cro. Jac. 497.

^q Moore, 874, pl. 1222.

^r *Ford's case*, 1 Siderf. 73;

^p *Burton et al. v. Gowell*, S. C. 1 Keb. 253, pl. 21. Cro. Eliz. 306, pl. 6.

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Where subsequent will or codicil revokes will.

And these acts of the deviser, amounting to a revocation, may be either by writing or *in pais*. First, by writing, as if one, having made a will, afterwards make another will inconsistent therewith, but not expressly revoking it, this will, nevertheless, be a revocation; for, by making the latter will inconsistent with the former, the former is, in law, revoked; the very making the latter furnishing a fact from which it must necessarily be inferred, that the former was intended by the testator not to stand; and then when a man makes a will, and afterwards does something by which it may be understood his intent is that that the will should be changed; this, in law, is a revocation*. Thus, if a man devise his land to two, and, by another will, give it to one of them, and die, he to whom it is devised by the last will shall have it†. So, likewise, if a deviser by one will give lands to his son, and by another will devise the same to his wife; the latter will revokes the former, and she shall have the land‡. Again, where, in trespass, the defendant justified the taking of the goods by virtue of a will by which they were devised to him, and of which will he was made executor, and the plaintiff replied, that the testator made another will, and thereby did constitute him executor; this was held a good replication, without a traverse that the defendant was executor; because, by making of the second will, which was contradictory to the first, inasmuch as he made another executor, the latter was, in law, revoked§.

But, it has been determined, that the mere circumstance of a latter will's existing, though expressly found by a jury, will not of itself be a foundation to decide it to be a revocation of a former will of land; because the second will may be of things of another nature, as of goods; or it may be of different things of the same nature, as other parcels of lands; or it may be a confirmation of the former;

* See 3 Wilson, 511, 512.

† See 3 Mod. Rep. 206.

‡ Ibid.

§ Year Book, 2 R. 3, fol. 3.

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it can never, therefore, be judged to be a revocation thereof until it be ascertained to be contradictory thereto. Thus where, on a special verdict in ejectment, the jury found, that *A.* seised in fee of the lands in question, made his will, and thereby devised them in manner therein stated; and, after making that testament, viz. &c. he made *aliud in testamentum in scriptis*, but what was the contents thereof, or its purport or effect, they did not know; the question was, whether the latter will, so found, was a revocation in law of the devise of lands in the former? And the Court declared their opinion, that they were not satisfied the second will did revoke the former; because it was not found that any lands were devised by the second will, so that it might or might not be consistent with the former; and, when the matter stood indifferent, the Court would not suppose a revocation of a will solemnly made. And this judgment was affirmed on appeal to the House of Lords^v.

And, though a latter will be expressly found to be different from a former, yet, if it be not known in what that difference consisted, it will be no revocation in law thereof; because a will may be different from a former in giving of a ring or mourning, and yet may stand and be perfectly consistent with it. The revocation, therefore, not being a consequence of the mere act of making another will, nor the abstract effect of making a will different from another will, but of the repugnance of the subject matter of the latter with that of the former; it follows, that the contents thereof must be known to be inconsistent with the previous disposition, before it can be decided to be a revocation of a former will; that depending upon the evidence it furnishes of the change in the testator's mind; which can only be judged of by knowing what appears in both instruments;

^v *Seymor et al. v. Nosworthy*, in scaccario Hard. 374; S. C. Show. Par. Ca. 146; S. C. by the name of *Hitchins v. Basset*, in Banco Regis, 3 Mod. Rep. 203; Comb. 90; 2 Salk. 592; 1 Show. 537.

or circumstances must be made out from whence that might be presumed, as spoliation, or the like; but no presumption can arise from a diversity, unless that diversity be shown and found; that, therefore, a second will, in the dark, which neither the jury nor the court ever saw, and were wholly ignorant of the contents of, ought not to be set up; for, if it were, an heir might avail himself, by destroying the second will, to defeat both wills.

But it still seems questionable, whether the precise facts in which a latter will, so set up as a revocation of a former will, differs from it, must necessarily be found; for if the jury find expressly, that the disposition made by the second will is inconsistent with the devises contained in the former, that appears to be a sufficient ground to decide the latter will a revocation; because evidence may be laid before them to prove an inconsistent disposition, or circumstances to lay a fair foundation for presuming it to be so, as spoliation, or the like. Whether a revocation or not is sometimes a question of law, sometimes of fact; as, where there are interlineations in a will. *Revocavit vel non* appears to be like *devisavit vel non*. All that seems necessary to be shown on a special verdict of this kind is, that the jury have found the second will to be, in the particular in question, repugnant to or inconsistent with the first. In the principal case that was not done, the jury having, at the same time that they found the latter will different from the first, expressly declared, that they did not know in what the difference consisted; the inference from which seems to be, that the only reason they had to imagine it different from the first was, that another had been made.

A codicil, likewise, if inconsistent with a preceding will, is, in law, a revocation of it². But a codicil differs from a latter will, which, from the nature of the instrument, has been held a total revocation of a disposition varied therein

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codicil.

² See *Attorney General v. Lloyd et al.* 3 Atk. 552; S. C. 1 Ves. 32.

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from what it was in a former will, although no express clause of revocation be inserted therein : for, a codicil being considered both in our law and in the civil law as part of a will, and taking effect together with it at the death of the testator, is, in its own nature, not intended to be a revocation of the instrument of the will, or of the particular dispositions therein, further than as specifically altered thereby, unless it contain words of express revocation. A codicil, therefore, is no revocation even of the particular disposition in a preceding will to which it is applicable, except precisely in the degree expressed, leaving the particular disposition affected thereby, as well as the instrument, in all other respects, precisely in the state in which it finds them⁷.

But it seems that if a man, by a subsequent will or codicil, make a disposition different from a former one under a false impression, the impulse of which is the foundation of his will to change his former intent; such an act will be considered only as effecting a contingent presumptive revocation, depending upon the existence or non-existence of that fact. As if one having previously devised to *A*, afterwards by another will, without destroying the first, or by codicil, devised to *B*. stating her to be his wife, so that it may be understood that he intended her to be benefited in that character only, and it turn out that she was married before and had a husband living, neither of which facts were in the devisor's knowledge; such devise or codicil would not operate as a revocation of the former will, because it depends upon a contingency which fails. Again, suppose one devised land to *A*. and afterwards, by a codicil, reciting his former will, and that he was advised that *A*. was dead, gave the same land to *B*.—if *A*. were alive, *B*. could not take; because the codicil would not be a revocation of the will under such circumstances. But care must be taken to distinguish between cases like the foregoing,

⁷ Swinb. 15; and see *Willet v. Sandford*, 1 Ves. 178, 186.

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where the testator acts under a false impression, originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised upon him; for although in cases of the first sort the devise will be void if the fact be otherwise than as the testator understands, yet, the law will be different in instances of the latter kind. Thus, if one having a niece who is married, and whose husband is living, having, subsequent to the marriage, devised his estate to his niece, afterwards make a will in these terms; viz. "It being doubtful whether, according to the rules of law or equity, I may devise my estate to the separate use of my niece, I therefore give and bequeath the same to my good friend, B. and his heirs for ever;" it seems questionable whether, on such a disposition, a court (grounding its decision upon the principle, that where the reason which a man gives for his devise is false, there his devise shall fail,) would say, that the law, in the case put, being now fixed and settled, and not doubtful, as stated by the testator, this devise should be void, and, consequently, not work a revocation of the former will, though the latter was founded on that reason; as such a doctrine might be carried to an extent which would render the effect of testamentary dispositions even still more uncertain and capricious than it is.

Both the preceding cases may also be again distinguished from cases, where the testator puts the devise upon a fact in his own knowledge, and grounds his devise upon that fact, and not upon the reality of the fact which he conceives himself to know, whether that should come out in the event according to his conception or not: as in the case of the *Attorney General v. Lloyd*, where the testator, stating he was "advised the devise of his lands would be void, and it being his intention the charity should be continued, and being advised his personal estate can be given, he does therefore, by this codicil, give his personal estate to the charitable uses before mentioned, and his real estate (which

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he had before given to the charity) to *M.*” Now here the testator has put his disposition upon the fact of his being advised, and not on the soundness of the advice; for his being advised was a fact in his own knowledge, and he grounds his devise, which he then makes, upon the fact of this advice, without reference to the reality of the law, though that should come out upon the event one way or another. In this case, and in cases of the like sort, the devise not being put upon the point of law, but upon the fact of the advice of the doubtfulness of the point of law, and depending upon the latter fact, and being made in consequence thereof, will be good, let the point of law turn out whichever way it may; the devise will consequently work a presumed revocation of the former disposition to the charity.

But, where a latter will is the instrument by which a former is revoked, the revocation effected thereby is ambulatory until the death of the testator; for although, by making a second, the testator intends to revoke the former, yet he may change his intention any time before his death, (until which neither of his wills can have operation;) and then the latter, being a revocable instrument itself, and only affecting the former as far as it is itself efficient, being revoked is as no will; the consequence of which is, that the first will, never having been cancelled, but remaining entire, stands in like manner as if no other had been made. Thus where a testator made a will of his lands, and afterwards gave the same lands to the same person by a latter will, but omitted to cancel the former, and afterwards cancelled the latter, and both wills were in the testator’s custody at the time of his death, the second cancelled, the first uncanceled; the question was, whether, under these circumstances, the first will was to be considered as revoked, and the devisor consequently dead intestate: and *per Curiam*, a will is ambulatory till the death of the testator². If the testator let it stand till he

² *Goodright v. Glazier*, 4 Burr. 2512; and see *Perk.* fol. 210, sec. 479.

die, it is his will; if he does not suffer it to do so, it is not his will. Here, though the testator made two wills, yet the second will never operated, for it was only intentional, and the testator changed his intention, and cancelled the second, so that it had no effect, it was as no will at all, being cancelled before his death; then the former, which was never cancelled, stood as his will; for none of the cases of revocations in law, by alteration of circumstances, applied to this sort of case, and it was clearly not a revocation within the meaning of the statute of frauds^a, none of the circumstances delineated in that statute existing in this case.

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But, if a prior will be made, and then a subsequent one, expressly revoking the former; in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again^b. So if a testator having made a new will, actually cancel the former will by tearing off the name and seal, &c. and afterwards cancel the latter will, the former will is not revived thereby, although a counterpart thereof be found in his possession uncanceled and undefaced: because, in both the preceding cases, the revocation is an express, independent, substantive act, by which the former will becomes to all intents and purposes void and incapable of taking any effect, unless as a new will by force of a republication^c.

A revocation may also be effected by acts in *pais*, amounting to a revocation in construction of law. This may be two ways; first, by a total alteration in the circumstances of the deviser; secondly, by an actual or intended alteration in the estate of the deviser.

Revocation of a devise by act in pais.

With respect to the first of these, it is to be observed, that no alteration in the circumstances of the deviser, except that of a marriage and having issue subsequent to the making his will, has as yet been determined to be a revo-

Alteration in the deviser's circumstances.

^a See sec. 6.

^c See Dougl. 40.

^b See Cooper, 53.

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cation of a will previously made; but that has been considered as producing such a change in a man's situation, as furnishes a fair ground to presume, that there must have been a change in his mind, respecting the disposition of his property^d. Thus, in the case of *Brown v. Thompson*, it was held by Sir John Trevor, Master of the Rolls, that a subsequent marriage and having children was a revocation of a will of land^e. And upon the same principle, it was decided in the Exchequer, upon a will, made by one in the life-time of a former wife, who died without issue, whereupon he married a second wife, by whom he had issue, that the testator's second marriage, and having issue by that marriage, was a total revocation of the will made in the life-time of the first wife^f. The same question occurred in the case of *Spragg v. Stone*^g, and was finally determined in the same way. And this case is rendered somewhat the more strong, by the circumstance of the testator's having made a second will, which, though ineffectual to pass lands, was certainly such an act as showed the testator's intent to revoke his will by another will, and thereby rebutted the presumption that the will had been, in the consideration of the testator, revoked by the marriage and having children. But, though the circumstance of the making another will was not sufficient to rebut the presumption, that the testator's intention with regard to his property was altered by marriage and having a child, yet collateral circumstances have been considered as rebutting this conclusion. As when, in the case of *Brown v. Thompson*, before mentioned^h, the testator had devised a

^d See *Wellington v. Wellington*, 4 Burr. 2171; see also Tr. Eq. Fonb. ed. b. 4, p. 1, c. 2, s. 1, notes; also Amb. 487, 557, 721; 5 Durnf. & E. 57.

^e *Brown v. Thompson*, heard at the Rolls, 1 P. Wms. 304, in notes; 1 Eq. Ca. Abr. 413, pl. 15.

^f *Christopher v. Christopher*, cited 4 Burr. 2182.

^g *Spragg v. Stone*, at the Cockpit, cited Dougl. 35.

^h *Brown v. Thompson*, 1 Eq. Ca. Abr. 413, pl. 15; and see 2 Brow. Ch. Ca. 4, 5; Ib. 220.

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legacy of 500 *l.* to his brother, and other legacies to other persons, and had given his real estate to *E. C.* and her heirs, which was the person with whom he afterwards intermarried, and whom, on his death, he left *privement enient* with a son; the Lord Keeper, although he was clearly of opinion, that an alteration of the testator's circumstances might be a revocation of a will of lands, yet he thought the alteration of circumstances here was not sufficient for that purpose: for no injury was done any person, and those whom the testator was bound to provide for were taken care of.

But there has yet been no case in which the marriage and birth of a child has been held to raise an implied revocation, where there has not been a disposition of the whole estate. It was a total disposition in the cases of *Christopher v. Christopher*, and *Spragg v. Stone*, and it always has been a total disposition in the cases of personal property; because, by making an executor the whole is disposed of. In such cases the inference is exceedingly strong in favour of the wife and children, but it by no means follows, that a like presumption is furnished when the disposition is only of a part of the testator's effects. Many reasons may be found why a man, though having a wife and child, should leave a considerable share of his fortune to go elsewhere. Suppose a man had given several legacies by his will, and had devised all his real estate to the use of his children when he should have any, would his subsequent marriage and birth of a child furnish any ground to presume a change of his intent as to a disposition so made? Now in the preceding case, the testator disposes of a small part of his estate to a charity, and then, in contemplation of his marriage, he settles a jointure upon his intended wife, with remainder to himself in fee; it is clear, therefore, that he contemplated the change in his situation after the will was made, and provided for it

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as to his wife, and it may be reasonably supposed that, as to his children, he meant to keep them in his power. There is sufficient undisposed of by the will amply to provide for them. What ground is there then to presume that he might not still entertain the intention of devising to the charity that part of his property given them, before marriage, by his will? There seems none, unless it can first be established as a clear proposition, that every man who marries and has a child, must necessarily intend that all he has in the world shall become theirs¹. The decision in the case of *Shepherd v. Shepherd*, though it arose on a will of personal property only, seems to furnish a strong ground in support of the foregoing observation; for the rules of presumed revocations are the same, whether applied to dispositions of real or personal property; in both cases they equally turn upon the intent; and then the judgment on that case seems to lay the foundation for the principle, that it must be a complete family disinherison by a will made before marriage, that furnishes a ground for a presumed revocation by marriage. In that case, Shepherd, the testator, after some small legacies to relations, constituted his wife residuary legatee². After the making of the will, his wife was brought to bed of a daughter, upon whose birth the testator added a codicil, whereby he directed that the legacies should be paid, and that an annuity should be secured on the *residuum* and paid to his daughter. The codicil and will were found together. Many years afterwards, another daughter was born, and soon after that a son, who was a posthumous child, the testator being dead about six months before his birth. And on a question, sent out of Chancery by Lord Camden for the opinion of Sir George Hay, whether the subsequent birth of children was a revocation of this will, it was deter-

¹ See Pow. Dev. 560. see Dougl. Rep. 38, note

² *Shepherd v. Shepherd*, 10.

mined, that the subsequent birth of children, even in case of personalty, did not amount to a revocation¹ (1).

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As to the effect of the marriage of a woman on her will previously made, it seems questionable whether the circumstance of marriage alone will amount to a presumed revocation, though it is perfectly clear that it suspends the will during the coverture, so that if she die previous to the determination of her coverture, by the death of her husband her will is countermanded and void; because the making of a will is but the inception of it, and it does not take any effect until the death of the deviser; *omne testamentum morte consummatum est, et voluntas ambulatrix usque extremum vite exitum*. And then, as the law will not allow a *feme covert* to make any devise, on account of the presumption that the law has, that it will be made by constraint of the husband, so the law will not suffer the continuance of it after marriage, for the presumption that the husband by constraint might cause her against her will to revoke or continue it; as therefore it would be against the nature of a will to be so absolute, that he who makes it, being of good and perfect memory, cannot countermand it; and as to permit a *feme covert* to revoke her will, would be open to the objection of compulsion; the law, to avoid both inconveniences, considers a woman's taking of a husband, which is her own act, to amount to a countermand in law, so long as the coverture

¹ See *Wakefield v. Combe*, 2 Ch. Ca. 16.

(1) Yet the case in Cicero, the principle of which has frequently been applied to instances occurring in our own courts, seems to warrant a contrary conclusion, if the case were of a father's dying, and leaving all his fortune to a stranger, under the idea that he had no child, and then having a posthumous child born. The proposition is thus put: *Pater credens filium suum esse mortuum, alterum instituit heredem. Filio domi redeunte, hujus institutionis vis est nulla.* Cic. de Oratore.

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continues^m. But if the husband die, leaving the wife surviving, then the will, it seems, will revive, and, on her death afterwards, take effect as if no marriage had intervened. Because it does not take effect until her death, at which time she was discovert, as she was at the time of making the willⁿ.

An alteration in the circumstances of the deviser as to his personal capacity, which renders him physically incapable of making or revoking a will, does not, however, in itself, amount to a revocation. As if a man of sound memory, make his will, and afterwards by the visitation of God, become of unsound memory; this act of God will not, in law, be a revocation of his will, which he made when he was of good and perfect memory. The reason for which seems to be, that in such circumstances a man cannot have any will, therefore from that time he must be considered as in the state of a non-entity, as to the exercise of the powers of willing or revoking. Such a change of circumstances consequently furnishes no ground for a presumption one way or the other^o.

Of revocations by an actual or intended alteration in the estate of the deviser.

On the first part of this inquiry it is necessary to observe, that the principle which governs in cases of an actual alteration in the estate of the deviser, is clearly distinguishable from that which governs in cases of an intended alteration only; for in cases of an intended alteration, the revocation is a consequence of law uninfluenced by, and independent of, any intent in the deviser to revoke or not; but, in cases of an intended alteration, the revocation is an inference from the fact, as furnishing a ground to conclude that such was the intent of the party. It will

^m See *Forse v. Hembling*, 4 Rep. 61; S. C. And. 11; Gouldsb. 109. ^o 4 Rep. 61, a, b; 1 And. 181; Goulds. 109; and see *Sackvill v. Ayleworth*, 1 Vern.

ⁿ See Plowd. Com. 343; but see 2 Bro. Ch. Ca. 534. 105.

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be necessary for us, therefore, if we wish to have a clear conception of this part of our subject, closely to attend to this distinction, as we shall find several nice and important consequences depending thereupon. There is no feature in our law more prominent, than that of an uniform solicitude on every occasion to favour the heir, and prevent his disinherison; this anxious attention to the interest of the lawful representative, has introduced into our law respecting devises, this fixed principle, namely, that, as at the time of the inception of his will, a man must be seised of the estate he devises, so the law requires that such estate should remain in the same plight, and unaltered, to the time of its consummation by his death: and that his original intention in respect thereto, should continue unremittingly the same, until the object of it takes effect, when the will is consummated thereby: and, therefore, not only any alteration or new modelling, which makes it a different estate, but also any intent of the owner to alter or new model the estate, will, in construction of law, render a disposition of it by will invalid. In this section we shall trace this principle in a variety of instances to which it has been applied with all the subtlety and nice distinctions of artificial reasoning and technical disquisition^p.

First, then, any alteration of the estate will, at law, operate as a revocation, whether it be made by act of a stranger, or by act of law; as first, by act of the party: with respect to this, it seems almost unnecessary to observe, that any actual sale or disposition by a devisor of his real property to a third person, after making his will respecting it, will be a complete revocation. But it is to be noticed, that this rule has not been confined to cases of alterations by an actual disposition to third persons; but has been extended to the case of an alteration in the legal

^p See 3 Atk. 741; 1 Ves. 308; Amb. 116; 2 Ves. jun. 599; 3 Ibid. 664.

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estate, although in effect it leaves the testator, as to his beneficial interest in the thing, in the same plight in which he was before it took place. Thus, in a very early period, where a man, seised in fee of land devisable by testament in an ancient borough, made his will when he had two sons; but, they dying, he afterwards aliened the land in fee, and took back an estate in fee, and died without any new publication of the will; and it was held that the will was void; for the alienation was a disagreement to it, and, therefore, without a new express agreement it could not be taken as his last will, because it had been once revoked¹. So if a man devise land to *J. S.* and afterwards make a feoffment in fee of it to a stranger, to the use of himself in fee, although he has his old estate, yet this is a revocation²; for his intent was to have it by the new limitation, and he by the feoffment passed an estate, and the statute revested it in him, which is as a new purchase. So, again, if a man devise land to *J. S.* in fee, and afterwards make a feoffment in fee to another to the use of himself for life, the remainder to his wife for life, the remainder to his own right heirs in fee; although here he has his old reversion, yet his intent was to have it pass by the livery, and to be in by the statute and the limitation, and so as a new purchase; it seems this is a revocation of the will as to the fee, and not confined to the estate for life of the wife³.

And the operation of the conveyance will be the same, if it be made by lease and release, or bargain and sale; for where *B.* by lease and release conveyed certain estates in *H.* to himself for life, remainder to his first and other sons in tail, remainder to himself for life, remainder to

¹ 1 Rol. Abr. 616, pl. 15; and *Pitt v. Langford*, 1 Show. 44 Edw. 3, 33; Dyer, 143; Rep. 92, 93; S. C. Rep. T. Bro. Abr. Dev. 8; Fitzh. Abr. Holt, 253.

258, 16; and see *Frances's* case, 8 Rep. 90.

² 1 Rol. Abr. 616, Q. 2; agreed per Cur. in *Montague v. Jeffries*.
and see Dyer, 143, a, b;

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himself in tail, remainder to the right heirs of *B.*, subject to a power of revocation by any deed or writing under his hand and seal, &c. so as at the time of revocation, he settled other land in Yorkshire, free from encumbrances, to the same uses. *B.* afterwards made his will, and, among other things, devised all his lands in Yorkshire and elsewhere to trustees upon trusts therein mentioned; then, by lease and release, intended by him as an execution of the power of revocation reserved in the former deeds, he conveyed a distinct estate in Yorkshire to the uses of the former settlement, but this estate was deficient in value, and the settlement of it not a good execution of the power. But the lease and release, being made subsequent to the will, was held, clearly to be a revocation *quoad* the devise of the Yorkshire estate, as part of all the testator's lands in Yorkshire mentioned to be devised by the will; and that estate, therefore, was held, not subject to the trusts thereby created¹. So, where a man by his will gave his estate in fee to one of his sisters, and afterwards made a marriage settlement, in which he limited the estate in strict settlement, remainder to his own right heirs; that settlement was held, notwithstanding the remainder was limited to his own right heirs, and so the old use, to be a revocation of the whole devise to the sister².

Again, it was held, in the case of *Bennet v. Wade*³, by Lord Hardwicke, that a recovery suffered of land after a will made, gave a new estate to the tenant to the *præcipe*, although the limitations were to the old uses; and, consequently, a revocation of a will previously made. So, where *A.* being, under his marriage settlement, tenant for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail,

¹ *Burgoyne v. Fox*, 1 Atk. 576.

² *Bennet v. Wade*, 2 Atk. 326.

³ *Martin v. Savage*, Barnard. 189; S. C. cited 1 Ves. 44b.

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remainder to himself in fee, made his will, and thereby devised the settled estates as in his will mentioned; and then, by indenture of lease and release, conveyed the same hereditaments to B. his heirs and assigns for ever; and afterwards, by another indenture, reciting the foregoing lease and release, and that the same was to make B. tenant to the *præcipe*, and for suffering a recovery, the uses whereof were therein declared, as to the lands in question, to be to himself and his heirs; then a recovery was suffered, after which A. the testator died without republishing his will, and without there having been any issue of the marriage. The question was, whether the deeds executed, and the recovery suffered, were, under the circumstances of this case, a revocation of the will? And the Court of Common Pleas certified, that the deeds executed, and the recovery suffered, were a revocation of the will, but did not give their reasons for this decision. The reason, however, seems to have been, that, by the recovery, A. drew the whole interest in the land into himself, and got one entire fee, a total new estate in fee, which could not be defeated but by the entry of the trustees to preserve contingent remainders; and that his former estate for life, with contingent remainders, &c. and remainder over in fee, were all gone, until the trustees should enter for the forfeiture, which they never did: so that A. died seised of an estate in fee in possession of the lands comprised in the settlement, which was a different estate from that which he had when he made the will.

And the rule is the same as to equitable estates, if any alteration be made in them by the testator, by his doing any act to alter the trusts, or limiting the estate to new uses; for equitable estates are governed by the same rules as legal estates². Thus, where the Earl of Lincoln, seised

¹ *Darley v. Darley*, 3 Wils. ² See 2 Atk. 579; and 6; S. C. 7 Brown's Ca. Par. 1 Ves. jun. 598.
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in fee of certain manors and estates, devised the same to C. for life, remainder to his first and other sons in tail, remainder to such persons to whom the earldom might descend in tail male; and then sold part of these estates, and mortgaged the parts in question, and afterwards, upon a whim, in contemplation of a marriage, of which there was no serious intention, by deed of lease and release conveyed his whole estate to trustees and their heirs in trust for himself till his then intended marriage should take effect, and then, as there limited. And the question between the heirs of the Earl, and those of the devisee was, whether the lease and release were a revocation of the will? And it being admitted that they would have been so had the Earl had the legal estate; but it was attempted to distinguish this case, upon the ground that he had but an equitable interest, the whole estate being before mortgaged in fee, and that, therefore, it ought to be considered according to equity. That as to the Earl's intention, it was plain that he did not intend to revoke or alter his will, unless or until that marriage should take effect; for, by the release, the estate was limited to him and his heirs till the marriage, which was just as it was before, and the marriage having never taken effect, the estate continued just as it was before. But the Lord Keeper was of opinion, that the will was revoked by these instruments, and decreed accordingly, and that decree was affirmed on appeal to the House of Lords*.

And the principle equally applies in the case of a resulting trust, as in cases where the trust is limited, if the whole fee is affected by the conveyance. Thus, where H. by will, devised his real estate, of which he was *cestui que trust*, to P. on condition that he took the name of H.

* *Earl of Lincoln's case*, to be law now, *per* Lord Show. Ca. Parl. 154; Eq. Mansf. Dougl. 722; but said Ca. Abr. 411; 2 Freem. 202, to be law, and to be observed cited by Lord Hardw. as law, in like cases in future, *per* 2 Atk. 579, 803; but denied Lord Mansf. 4 Burr. 1961.

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upon him and the heirs male of his body, with divers remainders over; and afterwards by lease and release *H.* together with his trustee, conveyed several manors and lands to trustees and their heirs, to the use of himself for life, without impeachment of waste, and that the trustees and their heirs should execute such conveyance thereof as he should by deed or will direct^b. *H.* died without altering or revoking the will, or making any other appointment touching his real estate; and the question was, whether this lease and release was a revocation of the will or not? and it was decreed that it was a revocation. Again, where, on articles before marriage, the wife, upon the husband's undertaking to do some acts for her benefit, covenanted that she would join with him in suffering a recovery of the estate in question, in which she had an estate-tail, and would settle it to him and his heirs, and would settle other estates in which she had a fee on him for life^c; the husband, being thus entitled to the equitable fee, afterwards devised this estate; but he having omitted to perform the acts he had obliged himself to do by the articles, they came to a new agreement, that he should not take any part of the estate *instantly* in fee, but should take the whole, subject to an appointment of the husband and wife, and, in default of such appointment, to him and his heirs; thereupon, a recovery was suffered by the husband and wife, the uses of which were declared to be to the purposes of the new agreement; then the husband died in the lifetime of his wife^d, without having made any appointment with her. And the question was, whether the recovery suffered by the husband and wife, and the uses of that recovery as declared by them, were a revocation of the will? And Lord Hardwicke was of opinion that it was: for it was plain, though there was no proof, they came to a new

^b *Pollen v. Hubbard*, 1 Eq. Wils. 308; S. C. 3 Atk. 741. Ca. Abr. 412, pl. 12.

^c *Parsons v. Freeman*, 3 that the husband survived.

^d In *Wilson* it is stated

agreement, to wit, that she should be let in to join with him in an appointment, and he, in consideration thereof, was to have a fee in that estate wherein before he had only an estate for his life; and though it was said, that as to the particular estate in question, it was only turning an equitable into a legal estate, yet it ought to appear that this was singly the purpose: but here it appeared that it was also to vary his interest in the other lands, for the recovery and uses were to operate upon the whole fee of both. The testator, therefore, under the recovery, took a fee differently qualified, conveyed differently, and disposable differently from that which he was entitled to under the articles.

And where the thing disposed of lies in grant, a will made thereof will be revoked by a subsequent grant, if thereby the fee in it be affected. As, where *A.* devised all his manors, messuages, tithes, tenements and hereditaments whatsoever, to trustees, their heirs and assigns, subject to the trusts therein mentioned, in trust for *C. A.* &c. for life, remainder, in trust, for his own right heirs for ever. Afterwards, *A.* by indenture, granted all the advowson, donation, and right of patronage of *B.* to and to the use of the same trustees; and by another indenture, dated on the day following, declared the grant in the preceding deed was upon trust, that the trustees, and the survivor and his heirs, should present to the said church, when vacant, the son of the then incumbent; and if there should be no such son, &c. then the trustees to stand seised of the advowson, in trust for the testator and his heirs, and, on request, to convey the same over to his or their use; and should present such clerk as the testator or his heirs should nominate; and in default of such nomination, then such clerk should be presented as the said trustees should think meet. The testator, soon after these deeds were executed, died without issue; and the question being, whether the will and codicils were revoked as to the advowson, &c. by the subsequent instruments? it was held, that

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they were; for the legal estate was actually conveyed by the grant, so likewise was the trust by the subsequent grant; for the profits of the accruer of the advowson were conveyed; and the clause at the end of the declaration of trust, viz. "and in default of such nomination, then such clerk should be presented as the said trustees should think meet," was material to show, that not only the whole legal estate, but the whole trust, was parted with by the new declaration of the testator, as thereby a case was put, in which the very trustees might have a right of nomination and presentation*.

And although the conveyance by which the estate is altered, be evidently made for a particular purpose, yet if the whole estate be affected thereby, it will be a revocation; as, if a man devise Blackacre to J. S. in fee, and then, upon a marriage between him and A. covenant to make a feoffment of the said Blackacre and other land to the use of himself in fee, remainder to his wife for life, the remainder in fee to his own right heirs, and afterwards make a feoffment accordingly: this, it is said by Rolle^f, will be a revocation; because the testator's intent appears to be to have the land by the new limitation, which is a revocation of his will. Again, if a man, seised in fee of an estate, devise it, and afterwards, on a settlement, by lease and release, took an estate to himself for life, with a limitation to a son when born, and the heirs of his body, without any trustees to preserve contingent remainders, it might be said, this was for a particular purpose, viz. to let in a son when born, and that it did not in the mean time make any alteration of the former estate; yet such conveyance has been clearly held to be a revocation of a will^g.

* *Sparrow v. Hardcastle*, 3 Atk: 799.

^f 2 Bro. Chan. Ca. 319; 3 Ves. jun. 864. See 1 Rol. Abr. 616, pl. 4, where it is said to have been determined

otherwise in *Montague and Jeffries's* case; but that decision denied by Rolle to be law.

^g See 3 Atk. 749.

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And an alteration in an estate devised will operate as a revocation, even although the act done be necessary to give effect to the disposition made by such devise^h. Thus, where tenant in tail devised his entail land, and afterwards, by bargain and sale enrolled, to make a tenant to the *præcipe* and a recovery, barred the entail. And the question was, whether, by this recovery, the will was made good or revoked? the court were unanimously of opinion, that the bargain and sale and recovery were a revocation of the will; because thereby all the estate was altered subsequent to its being made, and the estate taken back was an estate to the recoveror and his heirs, and not to the deviseeⁱ. So if a man covenant by indenture to levy a fine, and that it shall enure to the use of such persons as he shall name in his will, and afterward make his will, by which he devises his land to certain persons, and then he levy a fine in performance of his covenant; this will be a revocation of the will, although levied in performance of the covenant which was entered into before the will made; for the land could not pass by relation to the covenant made, but only to the time of the fine levied^k. And if A. devise land and levy a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this, it seems, will be a revocation^l: because a fine operates as such from the return of the writ of covenant, and is a fine of that term in which the writ is made returnable; for the *concordia facta in curia* is the complete fine, the *concessit recordat* being merely the leave of the court to enrol it. And yet this is allowed to be a hard case, since by the caption, the party conusor does all his part, and the rest is only the act of the clerk or his

^h 1 Bro. Chan. Cas. 319;² Ves. jun. 430, 599, 601.ⁱ *Dister v. Dister*, 3 Lev. 108; *S. L. Marwood v. Turner*, 3 P. Wms. 163.^k *Lutwidge v. Martin*, 1 Rol. Abr. 714, O. 3.^l See 3 P. Wms. 170, note B; and *Lloyd v. Lord Saye and Sele*, 1 Salk. 341.

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attorney, without any particular instructions from the party.

And although the act be expressly declared to be done with a view to give effect to the will, the rule of law will be the same, if, in its operation, the devisor be in as of a new purchase; for the rule being introduced with a view to preserve the inheritance in the heir at law, and not with a view to carry into execution the intent of the devisor, the question is, not whether the devisor intended to revoke, but whether he intended to do that act, the effect of which, in law, will be to alter the estate or interest which was in him, by passing it away, and taking it back through a new channel; for if that be his intention, whether he meant to revoke it or not is immaterial, the mere intent to alter operating as a revocation in law, and not as a revocation by the party, and taking effect, therefore, without reference to the intent of the party, as to the stability or non-stability of the will^m. Thus, where one, being a bastard, made his will, and thereby devised a manor, and afterwards he made a feoffment of the same manor to the use of such persons and for such estates as he had declared by his will, bearing date, &c. it was adjudged that this feoffment was a revocation of the willⁿ.

And the courts have gone still further, and held, that if a man be seised in fee, but thinking he had only an estate-tail, suffer a recovery, in order to confirm his will, the recovery will operate as a revocation of his will^o.

And although the act done by the testator, and which alters the estate before devised, be that very act which, at the time of making the will, the testator intended to be done, yet it will in law be a revocation of the will. Thus

^m See 2 Atk. 579.

ⁿ *Hussey's case*, Moore, 789, pl. 1090; S. C. 1 Rol. Abr. 614, O. 2; *sed nota*, in this case the revoked will

was held to be sufficient to declare the use of feoffment, and prevent the escheat.

^o *Per Lord Hardw.* 3 Atk. 803, 804.

where *M.* devised a messuage in *L.* to her sister for life, and after her decease to trustees to sell the same, and to apply part of the produce to *A.* and others, and gave the residue to *C.* After making the will, *M.* sold the estate, and part of the purchase-money was left on mortgage of the estate, and the remainder laid out in the purchase of stock; then the testatrix died without republishing the will: and the question being, whether this sale was a revocation of the will? it was held that it was; for there was an absolute disposition made by the will, and before that could take effect, another absolute disposition inconsistent with it^p.

Further, a specific devise of a lease for lives will be revoked by a surrender and renewal made subsequent to the will; for by the surrender of the old lease, the testator puts all out of him, and divests himself, in consideration of law, of the whole interest, so that there being nothing left of the old lease for the devise to operate upon, the will must fall to the ground^q. Thus, where Sir *M. S.* being seised of an estate for three lives, devised the same to trustees and their heirs, during the three lives, expressing an ardent desire that the trustees would take care from time to time to renew the lease, and use their utmost endeavours to preserve the estate to the heirs male of the family, as long as the honour of baronetship should continue therein^r. The testator, after making of the will, surrendered his lease for lives, and took a new lease to him and his heirs for three lives, and put in a new life. Then Sir *S. M.* died. And the court held, that by the surrender and renewal, the lease was gone, and the will consequently void.

And the rule of law is the same as to terms for years renewable on fines, &c. For the renewal of them will

^p *Arnold v. Arnold*, Bro. Rep. Ch. 401.

^r *Marwood v. Turner*, 3 P. Wms. 163.

^q See 1 P. Wms. 575; 3 Anstr. 821.

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likewise operate as a revocation of a will expressly disposing of such lease; and although the claim of the devisee, from circumstances, be maintainable only in a court of equity, the operation of law will be the same. Thus, where *B.* possessed of two college leases, made his will, and thereby gave and devised all his college leases which he then held of Magdalen College to his mother, to be by her sold, and the money arising by sale to be applied as therein mentioned*. The mother died in the life of the testator. Some years after making the will, *B.* surrendered one of the leases, and accepted a new lease of the said lands, sealed with the college seal, and paid a large sum of money by way of fine. Then the testator died, without having republished or altered his will; it being admitted that, in equity, the death of the mother did not affect the right of the *cestui que trusts*, so far as she was barely a trustee, but that remained the same as if the trustee had been living; the question was, whether the renewal of this lease by the testator, after making his will, was, in law, a revocation of it? And it was held that it was; for this was not a devise of the land, but a devise of the lease which the testator held of Magdalen College; so that it was the same as if the testator had devised a term, and that term had been surrendered and gone. Here was an utter annihilation of the old term, and a purchase of a new one. Where a testator expressed himself in the present tense, it must relate to what was in being at the time of making the will. If this had been an immediate bequest, it would have been a revocation in law, so would it be in equity; for the rule as to revocations is the same in equity as at law†. And if the devise of a term be expressed in words describing the thing in which the interest for term of years is, without

* *Abney v. Miller*, 2 Atk. 593. new purchase or acquisition, and though coming from the mother, will go to the heirs of the father after renewal.

† See *Mason v. Day*, Prec. Cha. 319. This lease is a

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being descriptive of the interest therein, it will nevertheless be revoked by a surrender and renewal afterwards, because the devise of the thing must be referred to the interest which the devisor had in the thing at the time of the devise, and cannot be referred to an interest not subsisting at that period. Thus, where a testatrix devised all her lands, tenements and hereditaments at *W.* in Yorkshire, and all her tithes and ecclesiastical dues out of *W.* aforesaid; or any other town or places near the same. At the time of making the will, she was possessed of a lease of these tithes under the Archbishop of York *. After making the will she surrendered this lease, and took a new one, of which she was possessed at the time of her death. And the question being, whether the renewal was a revocation of the will? it was attempted to distinguish this from the preceding case, upon the ground that, in the preceding case, the will mentioned all the testator's estate, &c. whereas here it was only described, all her tithes at *W.* *Sed, per Curiam*, there is no real distinction between the words all my tithes at *W.* and the words all my lease or interest in my lease at *W.* because both must refer to the interest she had at the time of making the will. Then that interest did not remain at the death of the testatrix; for, by the surrender, she so far altered her interest, that what were her tithes under the lease at making the will, could not be considered, under the foot of this clause, as being the same at the time of her death; but she acquired a new estate in them, to commence at and run out to a different period of time. It must then be considered, that the testatrix acquired a new interest subsequent to the will, and, consequently, such an interest as would not pass by the words used. Again, where *S.* by his will, among other devises, gave and devised unto *B.* the perpetual advowson, and disposal of the living or rectory of *W.* for ever, together with the tithes of all sorts thereof. The

* *Rudstone v. Anderson*, 2 Ves. 418; and see 3 Anstr. 821.

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rectory of *W.* was held by the testator by lease from New College, Oxford, for the term of ten years². After the will made, the testator surrendered up that lease, and took a new lease from the college for ten years more, and was possessed of the rectory, by virtue of that lease, at the time of his decease. And it was held that the surrender and renewal were a revocation.

But it is necessary here to observe, on these cases of revocations of wills respecting leases by subsequent surrender and renewal of the lease, that they appear, after all, to turn merely on the penning of the will, viz. upon whether the words are sufficient or insufficient to pass the subsequent renewed interest; and not on any inability in point of law to give by will an after-taken lease; for if such lease be disposed of by will by a competent form of words, it will pass notwithstanding any subsequent renewal³. Thus if a testator give "all his estate, right and interest, he shall have to come in such lease at the time of his death," will pass notwithstanding a renewal subsequent to the time of making the will². So a right of renewal will pass by a general devise of the residue; or by a devise of the lease together with the right of renewal: And in the latter case, if the devisor do nothing, the expiration of the old term will not bar the devisee; because the devise carries the right of renewal as well as the lease itself. Upon this principle Lord Hardwicke, in the case of *Sterling v. Lydiard*², where the testator devised "all and singular his leasehold estate, goods, chattels and personal estate whatsoever, to his daughter *A.*" and in the residuary clause repeated the words "all and singular, &c." And after making this will, the testator renewed a lease with the Dean and Chapter of Windsor; on the question, whether this this renewal was a revocation of the will as to the

² *Hone v. Medcraft*, Bro. Ch. Ca. 261.

² 2 Atk. 599; 3 Atk. 177.

² *Sterling v. Lydiard*, 3

³ Vide *Bunter v. Cook*, Atk. 199.

¹ Salk. 237; 1 P. Wms. 575.

lease? Lord Hardwicke said, there was no doubt but the leasehold estate passed by the will^b. For the lease here was not a specific legacy nor any thing like it, the clause was only an enumeration of the several particulars of the testator's personal estate, but the devise was generally whole.

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And in no case, if the renewed lease be not complete at the death of the testator, will the previous disposition be affected by the surrender. Where, therefore, in the before-mentioned case of *Abney v. Miller*, although the devisor had surrendered and accepted of a new lease, yet one of the leases disposed of, not having been sealed with the college seal until after the testator's death, Lord Hardwicke held that the will, as to that, remained valid^c.

And where the revocation depends upon the exclusive fact that the estate devised is altered, independent of any intention of the testator one way or the other, the nature of the interest in or of the thing devised, must be actually and substantially changed; for otherwise there will be no revocation in law. It was therefore formerly held, that if a man, seised in fee of land, devised it to his brother, and afterwards covenanted with *B.* upon a marriage with the sister of *B.* to make a feoffment in fee of the same land and of other land also, which feoffment should be to the use of himself for life, the remainder to *B.*'s sister for life for her jointure, such covenant was no revocation of the will, because possibly it might never be performed^d. But since courts of equity have considered articles for the sale of estates, or respecting the settlement of them, as of the nature of actual conveyances from the time at which they are agreed to be carried into execution; covenants, when the covenantee has a right to a specific performance, have been allowed, in equity, to operate as revocations of wills

^b *Carte v. Carte*, 3 Atk. 174.

^c 2 Atk. 593.

^d *Montague v. Jeffries*, 1 Rol. Abr. 615, pl. 3; and see 1 Blac. 349.

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previously made. Thus, where *A.* devised to his eldest daughter a moiety of his real estate, and afterwards, on the marriage of such daughter, by articles, covenanted to settle one moiety of all his real estate to the use of himself for life, remainder to his eldest daughter and her husband for their lives, remainder to their younger children in tail general, remainder to himself in fee; it was held that these articles were a revocation of the will as to the moiety devised, for though this was but a covenant, and therefore, at law, no revocation of the will by which the testator had disposed of his real estate, yet the same, being for a valuable consideration, was, in equity, tantamount to a conveyance, and, consequently, in equity, a revocation of the will as to a moiety of the six houses devised by the testator^c. So, where copyhold lands were surrendered to such uses as the wife by any writing, or by her last will, should appoint; who accordingly, by her will appointed the same to her daughter in tail, remainder in fee. Afterwards, the wife, surviving her husband, covenanted to surrender the lands to the use of an intended second husband and herself and his heirs; which was held to revoke the will: for, *per Curiam*, though a covenant or articles do not, at law, revoke a will, yet if entered into for a valuable consideration, they amount, in equity, to a conveyance, and must consequently be an equitable revocation of a will^f.

But it has been held (upon the principle that no actual alteration is made in the thing devised) that the changing of trustees, where the estate originally devised is only the trust, will not amount to a revocation in law of the will. Thus, where *A.* made his will, and devised that his feoffees in trust should make a lease to *C.* and *D.* for eighty years, at a certain rent payable to his executors; and, being afterwards resolved to change the feoffees in trust, caused

^c *Rider v. Wager*, 2 P. Wms. 329; and see 2 Ves. Wms. 624.
^f *Cotter v. Layer*, 2 P. jun. 429.

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them, or some of them, to join with him in a feoffment of the devised hereditaments to new trustees and their heirs, to the use of A. and others, until A. limited or ordered new uses thereof, which he never did; it was held that the feoffment was, in equity, no revocation of the will^s. So, where W. by his will devised all his real estate in Berkshire to certain trustees and their heirs, to the use of his first and second sons, &c. successively in strict settlement, with remainder to his own right heirs; and afterwards made a codicil to this will, by which, after reciting that since the publication thereof he had contracted for the purchase of certain lands, he directed the trustees and executors in his will to pay the purchase-money out of the residuum of his personal estate; and that, on payment thereof, the said purchased lands should be settled to the same uses and trusts as by his will he had limited his other estates. Afterwards the testator completed the purchase, and took a conveyance to certain trustees in fee, in trust for himself and his heirs; soon after which he died. And it was decreed that this was no revocation; for before the purchase was completed, the vendor was but a trustee for the purchaser, and the completion of the purchase was but taking the estate home^b. So again, where G. having mortgaged his lands in fee; afterwards, on the marriage of his son, conveyed them to trustees, upon trusts therein mentioned, with remainder to himself in fee. He then devised the reversion in fee of part of these lands to trustees and their heirs, in trust to sell the same and pay off the encumbrances¹. Afterwards the mortgagee, in consideration of the mortgage-money paid off, conveyed the mortgaged estates comprised in the marriage settlement to the trustees by lease and release to the uses therein limited. Then by lease and release, reciting

^s *Bark v. Zouch*, 1 Rep. Dougl. 691, Canc. temp. Ch. 23; and see *Coles v.* 14 Geo. 3.

Hancock, 2 Ch. Rep. 109.

¹ *Doe lessee of Gibbons v.*

^b *Fullarton v. Watts*, cited *Pott et al.* Dougl. 710.

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Revocation.

the above facts, the same estates were conveyed by the trustees to a trustee in trust for G. in fee. Then G. died without having done any other act to revoke or alter his will. And on a question, whether these instruments amounted in law to a revocation? *per Curiam*, unanimously, G. at the time of the devise, had merely the equitable fee in him; the mortgagee was his trustee. Then, on payment of the mortgage-money, she conveyed the legal estate in fee to the trustee, which was merely transferring it from one trustee to another; and there had been no determination or case in which the change of a trustee had been held to revoke a will. They therefore thought the will was not revoked. And Lord Hardwicke, in the case of *Parsons v. Freeman*^k, laid it down as a general proposition, "That where a man had an equitable interest in fee in an estate, and devised it, and afterwards took, by a legal conveyance, the legal estate therein to the same uses, this was no revocation;" for this was the common case where a man contracted for the purchase of lands, and, before any legal conveyance thereof made to him, devised the same, and died; in such case the devisee might compel a specific performance, and should have sufficient of the testator's personal estate to pay the purchase-money; and, though the devise were between the articles and the legal conveyance, the latter was no revocation; for, of what kind soever it might be, it was only instrumental in changing an equitable into a legal estate, and made no alteration in the will. But his Lordship, at the same time, observed, that it could not be laid down as a general rule, that the turning of a legal estate into an equitable one would not be a revocation; because if a man, seised in fee, devised, and afterwards conveyed his estate in trust for himself, this certainly would be a revocation^l.

^k *Parsons v. Freeman*, 1 Rol. Abr. 616, pl. 3; Dyer, Wilson, 311; and see 3 P. 73, pl. 10; 2 Ves. jun. 429, Wms. 170; *Greenhill v. 600.*
Greenhill, 2 Vern. 679; 1 ^l 1 Wilson, 311.

DEVISE.

Revocation.

And where several instruments taken together operate as one conveyance of land, a devise made thereof, between the execution of the first instrument and the completion of the last, will be valid; because all the parts of such a conveyance will be considered as constituting one whole by reference to its inception. Thus, where tenant in tail executed a bargain and sale to make a tenant to the *præcipe* in order to suffer a common recovery to the use of himself in fee-simple^m; after the bargain and sale, and after the beginning of the term in which the recovery was completed, but before the return of the writ of entry, he devised them; and on a question sent out of Chancery for the opinion of the Court of King's Bench, whether the lands passed by this will? the court certified that the will was valid. The foundation of which appears to have been, that the court considered the whole transaction as one conveyance, each part whereof must relate to the date of the bargain and sale, which was the principal part, and which was perfected, made absolute, and delivered from objections, by the subsequent ceremonies. So where a copyhold estate was surrendered to the uses of a marriage settlement, which left, in the surrenderor the reversion in fee, and a power to devise the same; afterwards a surrender was made by him to the use of his will, and a will made accordingly; then the surrenderor was called upon by the steward to be admitted to some of the particular estates created by the original surrender, which was doneⁿ. And the court held, that this admittance did not operate as a revocation of the prior will; because the whole transaction might be considered as one and the same, and then the admittance would relate to the original surrender, and be prior to the will^o.

^m *Selwyn v. Selwyn*, 1 Blac. Rep. 251; S. C. 2 Burr. 1131.

ⁿ So explained by Lord Mansf. 4 Burr. 1962; and S. C. 1 Blac. Rep. 605.

^o *Roe on the dem. of Noden v. Griffiths*, 1 Blac. Rep. 605; S. C. 4 Burr. 1962.

DEVISE.

Revocation.

A surrender of a copyhold to new uses, with remainder to the surrenderor in fee, will be no revocation of a will under a surrender previously made. Thus where, in 1733, copyhold tenements were surrendered to the use of *T.* and *B.* his wife, for their lives, remainder to the heirs and assigns of *T.* and they were accordingly admitted; and then *T.* surrendered to the use of his will. *B.* died, and *T.* on his second marriage in 1744, surrendered these tenements to the use of himself and wife for their respective lives, remainder to the heirs of their two bodies, remainder to the right heirs of *T.* No admission was had by *T.* under this surrender. Afterwards, *T.* devised the estates^p; and a question was made, whether, by the subsequent acts, the surrender to the use of the devisor's will was at an end? and *per Curiam*, unanimously, the old use in fee granted to *T.* in 1733, to which he was then admitted, and which was surrendered to the use of his will, was not taken out of him by the new limitation and surrender of 1744. He had therefore no occasion to be readmitted to it for the purpose of surrendering to the use of his will, but shall be construed to be in of his old estate.

A partition between tenants in common, is no revocation, if confined to that object merely. As where *A.* and two others being tenants in common of lands in fee; *A.* made his will of his third part, and afterwards, by indenture and fine, partition was made betwixt the tenants in common. And it was held by all the Barons, that this was not a revocation of the devise^q. So in a similar case, where one of the tenants in common devised his moiety in fee, and afterwards partition was made between them by deed and fine, and the use of a moiety declared to each in severalty^r. The case was sent by Lord Chancellor King

^p *Thrustout* on the dem. of *Gower v. Cunningham*, 2 Blac. Rep. 1046.

^q *Riley v. Battinglass*, Sir T. Raym. 240; and see 2 Ves. jun. 600.

^r *Luther v. Kidley*, 3 P. Wms. 170, note B; but see 3 Keb. 357, pl. 48; and S.C. 1 Sid. 90, *cont.* but a republication presumed.

to the Judges of the King's Bench to give their opinion, whether this was a revocation of the will; and they certified unanimously, that the will was not revoked by the deed and the fine. But, if the conveyance, by which a partition is made, be for any other purpose except merely that of partition, it will, it seems, operate as a revocation of a will previously made. For, where *R.* and *H.* being each seised of an undivided moiety of lands, devised all his lands and tenements, and all his moiety to his wife. Afterwards a deed of partition was made and executed between *R.* and *H.* and the lands in question were allotted to *R.* and it was covenanted therein that they and their wives should all join in levying a fine (which was done) and that the same, as to the lands in question, should enure to the use of *R.* and such persons, &c. as he should, by deed or will, appoint; and, in default of appointment, to the use of *R.* in fee. Lord Chief Justice Lee held this to be clearly a revocation of the will, and not like the case of a bare partition only, unattended by a fine or conveyance to a new use, which would not have been a revocation*.

A will may likewise be revoked, we have said, by an intended alteration of the estate of the devisor. Under this head may properly be arranged those cases where the devisor attempts to make a disposition of his estate, and intends a complete conveyance, but fails in doing it, either for want of efficacy in the instrument made use of, or from an incapacity in the grantee to take the thing conveyed. *7*

Revocation by
an alteration
intended to be
made by the
testator in his
estate.

An instance of the first kind occurred in the case of *Montague v. Jeffries*; where *A.* seised in fee of *M.* and of *G.* devised them to *B.* He upon his marriage made a feoffment to the use of himself and intended wife, and livery was executed of *M.* but not of *G.* and the court were of opinion that the feoffment, though without livery, was a revocation of the will as to *G.* as well as *M.* for it

* *Titner v. Titner*, cited 745, 750; and see 2 Ves. 1 Wils. 309, and 3 Atk. 742, jun. 429.

DEVISE.

Revocation.

clearly imported an intention to alter the former disposition made by the devise¹. So *per* Popham and Gawdy, if a man seised of a reversion expectant on an estate for life, devise it to one, and afterwards, by deed, grant the reversion in fee to another, although the lessee for life never attorned, yet this worked a revocation; inasmuch as the devisor plainly shows his intent that the legatee shall have it². So, if a man devise lands to one, and afterwards bargain and sell them to another, and acknowledge the bargain and sale in order that it may be enrolled, this shall be a revocation of the will, although the bargain and sale be not enrolled within the six months³. Again, if at common law a man had devised land by his will in writing, and had afterwards devised it to another by parol: although the latter devise was void as a will, yet it was a revocation of the first will⁴.

But it is to be observed, that in these cases of imperfect conveyances, it may be shown, that the devisor had in fact no intent to alter the disposition made by him; and if that case be made out in proof, no revocation will ensue from the circumstance of there having been such imperfect conveyance, those conveyances differing from those of actual alterations of the estate devised, inasmuch as the former rest entirely upon a change of the intent to dispose by will, inferred from the attempt to convey in another manner than in the will is affected, whereas the latter turn upon the fact of the alteration only, and are governed by that without any reference to the intent (1).

Thus, where A. devised land to W. and his heirs in fee, and afterwards made a deed of feoffment of them to the

¹ Moore, 429, Ca. 599; S.C. Poph. 108; 1 Rol. Abr. 615; and see 2 Atk. 72, 73, 803; 1 Blac. 349; and 3 Ves. jun. 653. ² 1 Rol. Abr. 615, pl. 6, agreed *per* Popham et Gawdy; et 1 Ves. 178, 180. ³ Rol. Abr. 615, pl. 7, *per* Popham.

⁴ 1 Rol. Abr. 615, pl. 5.

(1) This distinction reconciles the before-mentioned case of *Montague v. Jeffries*, with *Winkfield's* case, which upon any other principle would be contradictory to each other.

DEVISE.

Revocation.

use of himself for life, with the remainder to the devisee in fee; but, before he sealed the deed of feoffment, he asked if it would be any prejudice to his will? and being answered, No; then, he said, he would seal it, for his intent was that his will should stand; and he sealed it, and a letter of attorney to make livery. Afterwards, livery was executed on part of the land, and then the devisor died. And it was held, that that part of the land of which livery had not been made passed by the will, the devise of it not being revoked by the feoffment without livery; for, *per Curiam*, it appeared that the mind of the testator was, that his will should stand, and if there was no feoffment, there was no revocation in law, and then there was no revocation in deed; for the devisor said, "if this will not hurt my will I will seal it:" and although the attorney made livery in part, so that the feoffment was perfect in part, yet for the lands in question, of which no livery was made, the will should stand; for a will might be effectual for part, and part might be revoked¹.

Instances of the second kind, that is to say, where the conveyance, made after the will, fails, from an incapacity to take in the person to whom the latter disposition is made, are likewise not unfrequent in the books. As where a man devised land to one, and, afterwards, by another will, devised it to the poor of such a parish, although the latter devise was void, because the devisees had not a capacity to take; yet this was a revocation. So if the latter devise had been to a corporation, a devise to whom is not within the statute, that likewise would have been a revocation, because the intent in the devisor to alter the disposition there made is clear².

¹ *Wingfield's case*, Gould. Ca. Abr. 359, pl. 9; Vin. 32, pl. 7; S. C. Godb. 132, Abr. tit. Dev. R. 3, in margin of Ca. 2; 1 Brow. Par. pl. 152; Owen, 176.

² 2 Rol. Abr. 614, pl. 4, 5; Ca. 450; 9 Mod. 190; 10 Roper v. Constable, 2 Eq. Ibid. 237.

DEVISE.

Revocation.

And, upon the same principle, a subsequent grant to a person incapable of taking is a revocation of a will previously made. Thus, where A. by his will, gave all his estate real and personal to his brother, and made him executor; and afterwards, by a deed-poll, gave and granted to his wife all his substance which he then had or might thereafter have; and on a question, whether this will was revoked by the deed-poll, *per* Lord Chancellor, the latter instrument cannot take effect as a grant or deed of gift to the wife, because the law will not permit a man to make a grant or conveyance to his wife in his life-time, neither will a court of equity suffer the wife to have the whole of the husband's estate while he is living; for, it is not in the nature of a provision, which is all the wife is entitled to. But, then, another consideration remains, *viz.* though it cannot take effect as a grant to the wife, yet, whether it be not an act so inconsistent and repugnant to the will, that it may, though an act not strictly legal, amount to a revocation. And his Lordship said, that he was of opinion it was, and declared that the will was revoked by the deed-poll, as to all the personal estate, to which alone the deed-poll extended^a.

Revocation of
devises by act
of a stranger.

Further revocations of devises may be made by an alteration in the estate of the devisor made by the act of a stranger. And these being effected by act of law merely, it is immaterial whether the intent of the devisor be to revoke or not. Thus it was held in the King's Bench by Yelverton and Mark, that if a man devise his lands, and afterwards be disseised, and die before entry, the devise is thereby revoked, notwithstanding there is no such intent in the devisor; because the disseisin turns it to a right, and it is then only a chose in action; and therefore it is a good plea against a devise, that the devisor

^a *Beard v. Beard*, 3 Atk. 72.

DEVISE.

Revocation.

did not die seised of the lands devised^b (1). But if the devisee re-enter, the devise will not, it seems, be affected by the temporary disseisin; because by re-entry the property is re-vested in the disseisee and the disseisin purged; for the regress of the disseisee has relation, as to the property, to continue the freehold in him *ab initio*. Also it is said, that if a father devise land to his youngest son, and the eldest son, knowing thereof, enter into the land and disseise the father, by which the will is void; yet, because it was made void by deceit and covin, it will be made good in Chancery^c.

But the cancelling or tearing of the will by a stranger shall not effect a revoking of it. Where, therefore, a man having devised his real estate to distant relations, and disinherited his heir at law, and a younger brother of the heir snatched the will out of the hands of the executor, and tore it to pieces; it was decreed, on a bill to have the will established, that the devisees should hold against the heir, and that he should convey, although no direct proof was made that the heir directed the tearing of the will^d.

Lastly, a revocation of a will may be effected by mere operation of law, without any act of the party. And in this case also, as well as in the preceding one, the intent

Revocation by
mere operation
of law.

^b See Year Book, Mich. Palm. Dōdridge, 205, unless a new publication; 1 Rol. 39 Hen. 6, 18, b, pl. 23; 1 Rol. Abr. 616, S. 1; and same law, Ca. T. Holt, 748. 174, pl. 1.

^c 11 Rep. 51, a, b; Ca. T. Holt, 748, but denied by ^d *Haines v. Haines*, 2 Vern. 441.

(1) But it seems, upon this doctrine, that a will may be rendered void by a secret transaction entirely unknown to the devisor. *Ex gra.* Suppose a man grant a lease at will, and the lessee make an under-lease for years, and the under-lessee enter and make a secret feoffment: in this case, if the lessor make or have made his will, it seems it will be revoked by the disseisin.

DEVISE

Revocation.

of the devisor is out of the question. Thus where *cestui que use* of lands prior to the statute 27 Hen. 8, devised them to his wife for life, remainder over; the trustees continued their estate to these uses until, by the passing of that statute, the devisor himself became seised of the same in his demesne as of fee, and died so seised, the wife entered; but it was held that the statute 27 Hen. 8, was a revocation of the devise to her^e. So a devise of annuities was held to be revoked, by being afterwards subscribed by act of parliament^f.

Revocations
pro tanto.

A will may moreover be revoked either absolutely or conditionally, or in all or in part; and if it be revoked in part only, the rest will stand^g. But having already considered what acts amount to an absolute and entire revocation, it will here be necessary to take notice of conditional or in part revocations only, which are properly denominated revocations *pro tanto*.

The most striking instance of a conditional or in part revocation, seems to be that of a mortgage in fee; which, at law, appears to have been, as well before, as after forfeiture of the condition, an absolute revocation of a will previously made, it being an alteration of the estate^h. And though courts of equity now consider a mortgage only as a conditional revocation *pro tanto*, depending upon the mortgage being discharged or not, yet they seem not to have viewed it in that light until after their jurisdiction was fully establishedⁱ. But, when the nature of a mortgage came to be better understood, and courts of equity

^e *Trevillian's case*, Dyer, 142, a. 143, b; S.C. 1 Rol. Abr. 616, R. 2; and see Gouldsb. 150; but see Ibid. 616, Q. 3, which seems contra: but the case Dyer, 73, pl. 10, which is referred to, is not adjudged.

^f *Thompson v. Roebottom*, cited 2 Ves. 419.

^g *Wingfield's case*, Gould. 32; Godb. 132; Owen, 76.

^h See 1 Rol. Abr. 617, Z. 3; Dyer, 143, b, in note; and see 2 Ves. jun. 417, 598, pl. 3; Ibid. 654, 685.

ⁱ See *Thomas v. North*, 11 Chan. Rep. 82.

DEVISE.

Revocation.

had established an exclusive jurisdiction over that species of property, they held that, though in law a mortgage in fee was implicit revocation of the whole estate, yet in equity the intent of the party in making it ought to be considered, which was only to supply himself with money for his occasions, and not with design to revoke the devise in his will. They therefore considered the conveyance as made for a particular purpose, as a pledge only for money, and though it was of a real estate, yet, in consideration of equity, the thing conveyed was looked upon merely as a personal interest; for it had, in equity, no quality of a real estate, and therefore was, in equity, no revocation of a real estate, the testator being considered there as having only created a chattel interest. This point was settled in the case of *Hall v. Dunch*, where *J. S.* devised the lands in question to *A.* in tail male, remainder to *B.* in fee, and having afterwards occasion for money, mortgaged the same in fee, and then died: after which, *A.* being dead without issue, *B.* brought his bill against the heir at law to be let into the benefit of the devise. It was insisted, on behalf of the heir, that the mortgage, being in fee, was an absolute revocation of the devise in equity, as it clearly was at law. But the Master of the Rolls was of opinion, that a mortgage in fee was a revocation *pro tanto* only, and decreed accordingly; and on an appeal to Lord Chancellor Jeffries, the decree was affirmed. And though a mortgage in fee be made by fine, as well as by deed, yet it will be only a conditional revocation *pro tanto*^k.

But, *per* Cowper, Chancellor, if a man devise lands, and afterwards mortgage the same for years, and then

^j *Hall v. Dunch*, 1 Jac. 2, 968; *Perkins v. Walker*, 1 Vern. 329; 2 Chan. Rep. Vern. 97.
^k *Rider v. Wager*, 2 P. 154; *Yorke v. Stone*, 1 Salk. 158; and see 3 Atk. 748, Wms. 329; 8 Vin. Abr. 136, 805; *Lord Bridgewater v. Duke of Bolton*, 2 Ld. Raym. pl. 10.

DEVISE.

Revocation.

levy a fine *sur conusance de droit come ceo*, &c. and not a fine *sur concessit*, this will be a revocation; but, if it had been a fine *sur concessit*, it had revoked only *pro tanto*. The reason of which seems to be, that a fine *come ceo* being in itself calculated to pass a fee, cannot be intended to have been levied simply in confirmation of the mortgage as a fine *sur concessit* might (*sed quære*). And a conveyance by way of mortgage for years is, even in law, as well as in equity, only a conditional revocation *pro tanto* of a devise in fee; the construction is still, however, different in law and in equity; for, in law, the mortgage is an absolute revocation *quoad* the term, though the reversion passes by the will notwithstanding; but, in equity, it is a revocation *pro tanto* only as well with respect to the term as to the reversion, and the reversion there draws to it the equity of redemption. Thus, where one devised a term for ninety-nine years carved out of an inheritance, in trust to pay an annuity to the testator's granddaughter for life, and, after making the will, the deviser mortgaged this land for five hundred years, it was held *per* Lord Cowper, Chancellor, that the mortgage was in equity a revocation *pro tanto* only of the devise of the annuity, and that the daughter should have the annuity, she keeping down the interest, or paying a third part of the mortgage-money or redemption¹.

A distinction has, however, been made, where the mortgage is to the devisee and where to a stranger; for if it be made to the devisee himself, it is an absolute revocation of a will previously made; because the mortgage is inconsistent with the devise; as a man can never have been intended to be made mortgagor and mortgagee at the same time. Thus, where *B.* seised in fee, devised lands to her daughter and her heirs, and afterwards, for securing 4,000*l.* to the same daughter, in which sum the devisee was indebted to her, for a legacy charged on the estate by their

¹ *Saunders v. Hawkins*, 8 Vin. Abr. 156, pl. 2.

father's will and interest, mortgaged them to her for five hundred years, with proviso to be void on payment of 100 *l.* per annum during the mother's life, and the 4,000 *l.* and the interest within three months after her death^m. This mortgage for five hundred years to the daughter, was decreed to be an absolute revocation of the devise thereof in fee to her by her mother's will, it being made to the same person as, and therefore inconsistent with, the devise.

DEVISE.

Revocation.

And upon the principle, that the conveyance is intended for the particular purpose of a security only, and therefore in its nature only personal, courts of equity have held, that where, after a will, the whole estate devised has been differently disposed of for the purpose of paying a debt, and consequently, with a view to a security merely, it shall be a revocation only for that particular purpose, namely, to let in the encumbrancer; because, in such case, the testator himself has drawn the line; and plainly shown how far his intention is that the revocation shall go. Thus, where a deviser, in order to pay a debt due to C. conveyed the same to him in fee, to be sold for that express purpose, and in trust for himself, the deviser, as to the residue; this was held to be, in equity, a revocation *pro tanto* onlyⁿ.

Revocations *pro tanto*, may operate either by altering the quality of the estate in abridging the interest in, or diminishing the quantity of, the thing devised. A man may alter the quality of the estate in the thing devised, by turning that which is conditional into an absolute estate. As, if a man command another to write his will, and thereby to give his wife an estate for life in his manor of D. and he writes, that the testator gives it her for her life,

^m *Harkness v. Rayley*, Vern. 241; 1 Eq. Ca. Abr. Prec. Chan. 514. 410, pl. 10; *Lloyd v. Spillett*,

ⁿ *Ogle v. Cooke*, cited 2 3 P. Wms. 344; S. C. 2 Eq. Atk. 272; and see *Vernon v. Jones*, Prec. Chan. 32; 2 148. Ca. Abr. 776, pl. 25; 2 Atk.

DEVISE.

Revocation.

upon condition that she shall not marry, and this condition being shown to the devisor, he disallows it; yet, by this, the estate is not revoked, but only the condition^o. So, if a man devise an estate upon condition, and afterwards, on reflection, strike out the condition. Upon the same principle, if a man abridge the quantity of interest that he has disposed of by his will; as if he, by any subsequent disposition, vary his will as to part of the estate he has previously given, leaving his disposition as to the remainder of it unaltered, this will operate as a revocation *pro tanto*. As if, after a devise in fee, the devisor lease to a stranger for life; this is no revocation of the fee, but only during the estate for life, because the devisor's intent does not appear to revoke but during that estate^p. So, if a testator devise an absolute estate in fee to A. and afterwards, by a subsequent devise, give him only an estate-tail in the same land, it is a revocation to the extent of the difference between an estate-tail and an estate in fee^q. Again, where T. devised lands to the use of his eldest son in tail, and then made a lease of thirty years to his youngest son, to commence after the death of the testator^r; and upon a question, whether this lease made to the youngest son being to commence at the same time at which the devise to the eldest was to take effect, operated as a revocation of the whole devise, or only *quoad* the term? the Court resolved unanimously, that it was not a revocation of the inheritance, but *quoad* the term only; for, both dispositions might stand together, and there could be no revocation unless it were expressed that the intent of the testator was changed, or that the dispositions could not stand together.

But although a lease, when made to a stranger to the

^o See *Sir Richard Perhall's* case, 1 Rol. Abr. 617, X. 1. ^q Per Lord Mansfield, Cooper, 90.

^p *Montague v. Jeffries*, 1 Rol. Abr. 616, U. 2; and see ^r *Hodgkinson v. Whood*, Cro. Car. 23. 3 Ves. jun. 653.

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devisee, is a revocation *pro tanto* only, yet it is held, that if it be made to the devisee himself, to commence from the death of the deviser, it is a total revocation: because the estates cannot stand together, and, consequently, by making the latter, the testator must have intended that the former should not stand. Where, therefore, C. devised his lands to his sister in fee, and afterwards let the same land to her by indenture for sixty years, to commence after his death: it was held, that the lease being made to the devisee, it was a revocation *in toto* of the devise¹. But it was agreed, in this case, unanimously, that if the lease made to the devisee had been to begin presently or futurely in the deviser's life-time, it would not have been a revocation of the will; for the lease might then have determined in the life-time of the deviser, and therefore have well stood with his will.

Further, revocations *pro tanto*, operating by alteration of the quantity both of the estate and subject, might, at common law, have been effected by the testator's declaring, that part of the thing devised should not go to the devisee²; and may now be effected by his disposing of any part of the hereditaments devised to different purposes from those in the will. As, where B. devised lands to trustees, in trust for his daughter, until her marriage with consent, then to convey the same to her and her heirs³. Afterwards she married in the life-time of her father, and with his consent, whereupon he settled part of the lands he had before devised to her upon her and her husband, and then he died. And it was held, that this settlement was no revocation as to the devise of the remainder of the lands which were not settled. Again, where B. bequeathed 800*l.* to his sister E. and also 400*l.* to his sister L. and afterwards, by a subsequent will, bequeathed 100*l.* to his

¹ *Coke v. Bullock*, Cro. 2 Vern. 720; S. C. 1 Eq. Jac. 49. Ca. Abr. 412, 13; 2 Ibid.

² 1 Rol. Abr. 617, Y. 1. 771, pl. 13; and see Goulds.

³ *Clarke et ux. v. Berkeley*, 32, 33.

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under 29 Car. 2,
c. 3, s. 6.

sister *L.* and 400 *l.* to his sister *E.* Lord Hardwicke was of opinion, that the legacies given by the second will were to be considered as part of the money given by the first, only new-modelled or qualified; and that the second will, therefore, was a revocation of the first *pro tanto* only².

Having endeavoured to explain the principles, the nature and extent of revocations, by the rules of the common law and of equity, we shall now consider how far they have been altered, added to, or abridged by the clause respecting revocations contained in the statute of frauds. By that statute it is enacted, "that no devise in writing, of lands, tenements or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn or obliterated by the testator or his directions, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or more witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

Upon the construction of this clause, it has been held to extend not only to devises of lands, but also to bequests of legacies charged upon lands; they must both be revoked in the same manner³. It has also been held, that it leaves virtual revocations, *i. e.* revocations by conclusion and operation of law, in the state in which it found them; they being founded upon maxims of law built upon conclusions from a physical necessity, the principal of which are, that *cessante causa, cessat effectus, et sublato fundo tollitur id quod fundi potest*². These, therefore, were

² *Brudenell v. Boughton*,
2 Atk. 268.

³ *Per Lord Hardw.* 2 Atk.
272.

² *Carthiew*, 81.

not affected by the statute, but remain as they were before.

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Revocations in this statute may be effected in three ways; first, by some other will or codicil in writing, or other writing declaring the same: secondly, by an act done to the instrument or will itself, as an outward visible sign of revocation, viz. burning, tearing, cancelling or obliteration by the testator, or in his presence, and by his directions and consent: thirdly, by some writing signed in the presence of three or more witnesses, declaring the same. In pointing out the two first of these modes, the statute seems to have been declaratory only of the common law, being descriptive of acts which would have amounted to a revocation previous to the making of this statute, except that the terms will or codicil in writing, in the first part of the revoking clause, being referred, in the construction of them, to the same words in the devising clause, it was held, that a second will or codicil in writing, amounting as such to a revocation of one already made by which lands were disposed of, must be such an one as would be effectual to convey lands within the devising clause of the statute, and therefore so qualified as the former clause required; for, after the statute, no instrument could be called will of the land, when every devise therein respecting land was void, which every devise respecting land in a will was, unless the will were conformable to the statute. Therefore, as such will could be a revocation, after the statute, no otherwise than as being a will of land, and a will, void as to land, is not a will of land, such void will cannot be a revocation. Thus where, on a special verdict it was found that J. S. by will, executed according to the statute, devised the lands in question to A. and the jury also found another writing published by the testator in his last will, in the presence of three witnesses, revoking all other and former wills; and that the witnesses in the last will subscribed their names to it where they could not be seen by the testator, which writing also gave the lands to A.

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—the last instrument not being good as a will to pass lands, because the witnesses did not subscribe their names in the testator's presence, it was held not to be a good writing, within the statute of frauds, to revoke the former will; for a second will must be a good will in all circumstances to revoke a former will^a. So, in the case of *Onyons v. Tyrer*^b, where one made his will, duly executed and attested according to the statute of frauds and perjuries; and, some time after, having a mind to change one of the trustees, he ordered his will to be written over again, without any variation whatsoever from the first, save only in the name of the trustee, and when it was so written over, he executed it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence; it was held that this second will not being good as a will to pass lands, should not be a revocation of the first.

With regard to the second mode of revocation pointed out by the statute, namely, by burning, tearing, cancelling or obliterating, &c. it is necessary to observe, that these acts being of such a nature as that they may happen, and that by the means of the testator himself, and yet without an intent in him to revoke, they cannot of themselves be considered as substantive revocations; but must be viewed relatively, with allusion to the temper of mind of the testator at the period when they happen; for these acts are only considered as furnishing evidence of the intent of the testator to revoke, (revocation by a deviser being an act of the mind, which must be demonstrated by some outward or visible sign or symbol); it follows, therefore, that as neither of these acts, unless done *animo revocandi*, will

^a *Egglestone v. Speke*, 3 Mod. Rep. 258; S. C. 1 Show. 89; Comb. 156; Carth. 79; and see 2 Atk. 272; S. L. per Lord Cowper in *Hyde v. Hyde*; 1 Eq. Ca. Abr. 409; 3 Chan. Rep. 83; but see *Hoile v. Clarke*, 3 Mod. 218, cont. by two judges to one.
^b *Onyons v. Tyrer*, 1 P. Wms. 343; S. C. Prec. Cha. 459; 2 Vern. 741; Gilb. Rep. Eq. 130.

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amount to a revocation, they being in themselves equivocal: to make either of them a revocation, it will be necessary to show *quo animo* it was done; because, unless it appears to have been done *animo revocandi*, it will be no revocation; for, if a man were to throw ink upon his will instead of sand, though it might be a complete defacing of the instrument, it would be no obliterating^c; or, suppose a man having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the latter^d; so, if a man having a will consisting of two parts, threw one unintentionally into the fire, where it was burnt, this would be no revocation of the devises contained in this part. It is the intention, therefore, that must govern in these cases: and in order to explain such act of cancelling, tearing, burning and obliterating, parol evidence must be let in: the question, therefore, of *revocavit vel non* is similar to the question of *devisavit vel non*, viz. a question of fact for the consideration of a jury^e. Upon this principle it has been held, that if any of these acts, viz. tearing, burning, cancelling or obliterating, be performed in the slightest manner, this, joined with a declared intent, will be a good revocation (for it is not necessary that the will or instrument itself should be totally destroyed or consumed, burnt or torn to pieces), because the change of intent is the substantive act, the fact done is only the sign or symbol by which that intent is rendered more obvious. Thus, where it appeared that the testator (who had for two months together frequently declared himself discontented with his will) being one day in bed near the fire, ordered *M. W.* who attended him, to fetch his will, which she did, and delivered it to him, it being

^c *Per* Ld. Mansf. Cooper, 52.

^e See *Titner v. Titner*, cited 3 Wils. 508.

^d *Per* Ld. Cowper, 1 P. Wms. 346.

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then whole, only somewhat erased^f; that he opened it, looked at it, and gave it something of a rip with his hands, and so tore it as almost to tear a bit off, then rumbled it together and threw it on the fire, but it fell off, and was taken up by *M. W.* who put it in her pocket: the testator died without making another will; and this was held a sufficient revocation of the will *per totam Curiam*, the Chief Justice observing, that this case fell within two of the specific acts described by the statute of frauds, it was both a burning and a tearing; and that throwing it in the fire, with an intent to burn, though it was only very slightly singed, and fell off, was sufficient within the statute.

And if there be two parts of a will, and the deviser cancel, burn, tear or obliterate one part, *animo revocandi*, that will be a revocation of the other^g. This principle, that the effect of the obliteration, cancelling, &c. depends upon the mind with which it is done, having been pursued in all its consequences, has introduced another distinction not yet taken notice of, namely, that of dependent relative revocations, in which the act of cancelling, &c. being done with reference to another act meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not.

Thus, where a man devised his real and personal estate to pay his debts and legacies, &c. and afterwards being desirous to add other trustees, and make some alterations therein, sent for a scrivener, and gave directions to prepare a draft of instructions for another will, which the scrivener did accordingly, and the testator read, approved, and set his hand to it; and being at a tavern, and thinking he had made a new will, he pulled the first will out of his

^f *Bibb* on the dem. of *Wms.* 346; 2 *Vern.* 742; *Burtonshaw v. Gilbert*, Cooper, Rep. 1043.

^g *Seymour's* case, cited 49; *Onyons v. Tyrer*, Prec. Comyns, 453; S. C. 1 P. 460, 461.

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pocket, and tore off the seals from the first eight sheets, which the scrivener seeing, asked him, what he was doing? he replied, that he was cancelling his first will^b. The scrivener desired him to hold his hand, informing him that the other will was not perfected: for it would not pass real estate for want of being executed pursuant to the statute of frauds and perjuries. The testator replied, he was sorry for that, and immediately desisted from tearing off any more of the seals. In a short time after the testator died, without having done any thing further to perfect the second will, or to cancel the first: and Cowper, Chancellor, held, that the subsequent will could be no revocation, as to the real estate, not being executed according to the statute of frauds; and that, as to the tearing off the seals from the first eight sheets of the first will, that not being done completely, *animo cancellandi*, was no revocation; for, as soon as the testator was told that the other will would not be sufficient to pass his real estate, he immediately desisted, and left the last sheet entire and uncanceled. So in the before-mentioned case of *Onyons v. Tyrer*¹, the testator having, after making the second will, insufficiently executed as before stated, cancelled the duplicate of the first, by tearing off the seal; this was held not to be a revocation of the first, within the statute of frauds and perjuries, because that was no self-subsisting independent act, but done to accompany or by way of affirmation of the second will; it was done from an opinion that the second will had actually revoked the first, which induced the testator to tear that, as of no use; therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it; for, though a man might, by the statute of frauds, as effectually destroy his will, by tearing or cancelling it, as by

^b *Hyde v. Hyde*, 1 Eq. Ca. and see *Hyde v. Mason*, 2 Abr. 409; S. C. 3 Chan. Eq. Ca. Abr. 776; S. C. Rep. 155. 8 Vin. Abr. 140, pl. 17;

¹ *Onyons v. Tyrer*, *supra*; Comyns, 451; 4 Burr. 2515.

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making a second will, yet, when he intended to revoke the first will by the second, and it was insufficient for that purpose, and the tearing and cancelling the first was only in consequence of his opinion that he thereby made good the second will, the tearing and cancelling will not destroy the first, but it ought to be considered as still subsisting and unrevoked (1).

(1) It is proper here to observe, that Lord Cowper, in deciding on this case, founded his judgment, on the effect of the second will, upon the same principle as that which governed his opinion respecting the cancelling; observing, that here was a disposition of the same lands in the second will to the same purposes as in the first will, which showed that the testator did not mean to revoke his first will as to the devise of these lands, unless he might, by the second will (at the same time that he revoked the former) set up the like devise, so as to take effect by his second will; and that, his second will being never so perfected as to make the devise of the lands therein to be good, the same devise stood unrevoked by the former will. And his Lordship, as the case is stated by Peere Williams, observed, that even if the estates in question had been given to a third person, yet it would not have let in the heir; in regard the meaning of the second will was, to give to the second devisee what it had taken from the first, without any consideration had to the heir, and, if the second devisee took nothing, the first could have lost nothing. But it is submitted that these cases rather fall under the distinction before mentioned, on the construction of the word Will in the revoking clause; as referred to the same word in the devising clause; especially as that appears to have been the ground on which the case of *Egglestone v. Speke* was determined, although in that case, the testator had devised the lands to the same person in the second will as was to have taken them in the first. And the ground for referring such case to that principle would be still stronger, if the second will had given the land devised in the first will to a third person; because, otherwise, it must come within the principle of cases of devises of land void in respect of the incapacity of the devisee to take, which, as has been shown, have nevertheless been deemed revocations; for, in those cases, the argument, that the testator did not mean to die intestate, but intended that the one devisee should take what the other lost, and the other lose what the last took,

A will may, moreover, be good as to part, although other parts have been obliterated by the testator subsequent to its execution. Thus, in *Sutton v. Sutton*^k, the deviser gave all his lands in possession, reversion or remainder, except a house at Bath, upon trust to sell and dispose of the said lands, and apply the money as therein directed to his wife and children. At the time of making his will the testator had a son and a daughter, and his wife was *enœint* with another child. After the date of the will, the testator having sold his house at Bath, and having two daughters born, he altered, obliterated and interlined his will to conform to those events. And the

^k *Sutton v. Sutton*, Cooper, 812.

took, is applicable; because the statute of frauds only affected wills in those circumstances which are there particularly specified; in all other respects it left them as they were at common law. Therefore, as before the statute, it was as much of the essence of a will that there should be a devisee capable to take, as, since the statute, it is of the essence of a will that it should be executed according to the forms prescribed by that statute, and that statute has not altered the nature of a will in respect to the existence of a devisee capable of taking, a devise made since the statute in favour of a devisee incapable of taking, will still be a revocation of a former devise, and yet the latter devise will itself be void; why, then, as a void will was, at common law, a revocation, and revocations at common law have not been altered by the statute, a void will must still be a revocation, though its inefficacy arises under the statute, unless some new ground is furnished by the statute to distinguish the cases; and it seems to have furnished that ground, if the word Will, in the statute, be construed to import a will, duly made according to the forms required thereby; and this mode of viewing the subject is more desirable, as, thereby, that beautiful analogy, which renders the common law of this country one of the most complete and noblest systems in the world, will be preserved pure and unblemished; than which nothing can more conduce to the benefit of those whose rights are to be decided by it, as it leads to the establishment of that certainty of decision which is the perfection of all human jurisprudence. See Pow. Dev, 640.

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court was clearly of opinion, that the devise to the trustees to sell, was not revoked by these alterations of other parts of the will, but continued in force.

We now come to the third mode of revocation mentioned in this sixth clause of the statute, in respect of which the reader cannot but have observed, that it materially differs in the forms prescribed to attend the execution of a writing for the purpose of revocation, from those prescribed as to a disposing will in the enacting clause, inasmuch as the former requires the instrument (which may be either a will, or codicil, or other writing) by which a former will is altered, to be signed in the presence of three or more witnesses; whereas the devising clause requires the will to be signed by three or more witnesses in the testator's presence, but does not require that they should be present together when he signs. This difference in the wording of the clauses, seems to have laid the foundation for a distinction between a will, &c. to revoke merely, and a will, &c. to devise and revoke, for if the object of a will be to devise and revoke, that is, if it be meant to be an effective, operative, disposing will, if it fails as such, it cannot take effect as a revoking will, &c. though it be an instrument duly executed according to the forms prescribed by the revoking clause; because the altering a will according to the third branch of the revoking clause, must be understood of an alteration by revocation merely, and not of an alteration by an inconsistent disposition, which can only be made by a disposing will, executed pursuant to the devising clause; for, if it were otherwise, the first branch and the last branch of the revoking clause would clash, since, by the last branch of it, no will could be revoked by another will, unless it were signed by the testator, in the presence of three witnesses; whereas, according to the first branch of the revoking clause, a latter will may be revoked by a will, codicil or other writing, which, in the construction of these words, has been expounded to intend a will, &c. made according to the forms required

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by the devising clause, *i. e.* signed by three or more witnesses in the testator's presence. So that if a man would alter his will by revocation only, he may effectuate it either by a strict will executed pursuant to the devising clause, or by a revoking will executed according to the revoking clause; but if he would alter his will by disposition and revocation, he can only effectuate that intention by a strict will, conformable to the devising clause. These observations seem to be warranted by the decisions in the cases of *Eglestone v. Speke*, and *Onyons v. Tyrer*; for, in those cases, the latter instruments were executed in the presence of three witnesses, as the revoking clause required, though they were not signed by the witnesses in the presence of the testator, as the devising clause required; but, being intended to take effect under the devising clause, and not under the revoking clause, they were held void and ineffectual as to both purposes; and would have been equally so if the dispositions in them had been to third persons instead of the original devisees; because the disposition to third persons would have furnished the same evidence of the testator's intent to proceed under the devising clause, and not under the revoking clause. And if this mode of considering it be right, the proposition put by Lord Cowper, on opening his judgment in the case of *Onyons v. Tyrer*, will be good law¹; namely, that if the testator had by his second will barely revoked the first, without declaring, by the same act, his intention to dispose of his lands to the same purposes to which they were devised by the former will, or to a third person; or, if the latter will had only extended to the personal estate, and barely revoked the first as to the real estate, the second will had been a good revocation of the former as to the lands devised; the ground of which opinion must have been, that then, as to the land, the last will would have been a mere revoking will, and, being duly executed according to the

¹ See 1 P. Wms. 344, n. (1).

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revoking clause in the statute, would, as such, have revoked the former devising will.

And a will, made under the revoking clause in the statute, will not be valid for that purpose, although there be a signature by the testator on the face of the instrument, unless that signature was intended by the party to give authenticity to the revoking instrument; for the name of the testator inserted on the body of the instrument, and applicable to particular purposes, will not amount to such an authentication as the statute requires. Thus, where *K.* seised of the tenements in question in fee, devised them to his daughters *D.* and *S.* and their heirs, and the will was duly made and signed, and the name of the testator written at the bottom of it^m; afterwards *K.* having an intention to revoke the will as to *D.* directed the following words to be written on his will, viz. "We, whose names are underwritten, do testify that the above-named *K.* did, the day of the date hereof, publish and declare that the several clauses and devises in his will, any way relating to his daughter *D.* should cease and be void, she being since married and her portion paid: in witness whereof we have hereunto set our hands this 28th day of October, 1680;" and the same was subscribed by four witnesses in his presence, but *K.* did not sign the same, nor any other person by his direction or by him authorized: these revoking words were written on the same side of the paper on which the will was written, and immediately under the testator's name subscribed thereto; and the question was, whether this was a good revocation according to the statute of frauds, not being subscribed by *K.*? and, on the first argument, North, Chief Justice, and Levinz, held, that inasmuch as the devisor's intent appeared fully in writing, and so there was no doubt of fraud and perjury, the signing by *K.* on the same paper would serve for all, and that it was not material whether it were signed on the top or bottom of the will or writing; because the statute did not say

^m *Hilton v. King*, 3 Lev. 85.

subscribed, but signed. But afterwards, North being removed, and Levinz sick, it was held by Pemberton, Chief Justice, and Wyndham and Charlton, Justices, that this was not a signing within the statute.

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Revocatioⁿ

IX. THE MEANS BY WHICH A VOID DEVISE MAY BE RESTORED.

A DEVISE, if not actually obliterated and destroyed, Republication. may, although revoked, be revived by a subsequent republication; for, being an ambulatory instrument, deriving its efficacy from the will and intent of the testator, it may be rescinded, suspended, enlarged or contracted as to its operation, at the pleasure of the devisor. And as, previous to the statute of frauds and perjuries, parol declarations were sufficient to revoke, so were they also sufficient to republish a devise. At common law, very slight words effected a republication of a will, it being an act peculiarly favoured^a. And as the same rule still applies in cases of copyhold devises, &c. I shall first advert to the nature of a republication at common law, and then consider republications as they stand at present. In *Trevillian's* case^o, before mentioned, it was found that the testator after the 32 Hen. 8, namely, in the 37 Hen. 8, *repetivit affirmavit, et allocavit, dictam ultimum voluntatem absque nova scriptura inde, vel data vel facta de novo*; and judgment was given by the court of Common Pleas unanimously in favour of the devisee. And Rolle, in his abridgment of the case of *Montague v. Jeffries*^p, in which many points are stated as having arisen which are not taken notice of by any other reporter of this case, states, as one point resolved, that if one seised of land devise his lands to J. S. and afterwards purchase the manor of D.

^a See 1 Ves. jun. 497.

343, 1652; and *Sir J. Bridges*

^o *Trevillian's* case, Dyer, 143, a, b; Bendloe, 38, pl. 151, East. 2 Eliz.; and see *Cheesman v. Turner*, Styles,

v. *Lord Chandos*, Ibid. 418, 1654; S. L. per Rolle, Chief Justice.

^p 1 Rol. Abr. 618, pl. 6, 7

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and then deliver the first will as his will, this is a new publication to make the late purchased lands pass. And these propositions seem fully supported by other cases ; as where *P.* devised all his lands in *A.* to *B.* and *J.* and constituted them his executrixes, and then purchased other lands in *A.* after which *J. S.* came to *P.* the devisor, and desired that he would sell unto him those lands which he had lately purchased ; but he replied, “ No, they shall go with my other lands in *A.* to my executrixes.” And then, he being sick, his will was read unto him and he said nothing thereto. And it was held by Fenner, Clench and Popham, *absente* Gawdy, that this was a new publication of the will to pass those lands, the words used by *J. S.* being sufficient to show his intent¹. Again, where *A.* devised his land in *D.* and all his other lands and tenements whatsoever, to his wife ; and then *A.* purchased other lands, and being afterwards discoursing with *B.*, *B.* desired him to let him have those new purchased lands at the rate at which he bought them ; but he answered no, for that he had made his will and settled his estate, and intended that his wife should have the whole of it. And the court inclined strongly that this was a new publication of the will so as to pass the after-purchased land². But the last-mentioned case is differently put as to the words used by the devisor by way of republication in *Vernon*³ ; the question being there stated to have turned upon the testator’s⁴ saying “ his will was in a box in his study,” which was held by Lord Chief Justice North to have been a republication. And the same case seems also to have received an adjudication in the court of King’s Bench⁵ ; for in a short note of Easter Term, 31 Car. 2, it is said to have been resolved

¹ *Beckford v. Parnecott*, Rep. 72, 73, in Chan. 1677, Cro. Eliz. 493, Mich. 38, 30 Car. 2 ; S. C. 1 Freem. 39 Eliz. ; S. C. Moore, 404 ; 264.
² Gouldsb. 150 ; and see 1 Ves. jun. 497.
³ 2 Vern. 209.
⁴ 2 Show. 48.

⁵ *Cotton v. Cotton*, 2 Cha.

there, by all the court, on a trial at bar directed out of **DEVISE.**
 Chancery, that these words "my will in the hands of J. S.
 shall stand," amounted to a good republication. **Republication.**

So any act of the deviser done subsequent to the revocation of his will, by which he demonstrated an intent that it should stand, amounted to a republication. As if a man had devised his land, and afterwards had aliened it to a stranger, and then, had repurchased it; and then, being on his death-bed, and it being brought to him, he had been desired, if it were his last will, to deliver it to A. as a signification thereof, and, if it were not, then to retain it, and he had delivered it to A. this, it seems, would have amounted to a republication¹. So in *Hussey's case*², before-mentioned, though a subsequent feoffment to the use of the feoffor's will was held to be a revocation of a will previously made; yet, the reference of the feoffment to the will held to give it effect, that operating as a new publication (1).

¹ 4 Edw. 3. 33; 2 R. 3. 3; 1 Rol. Abr. 617, Z. 1; and see 1 Ves. jun. 497.
² *Hussey's case*, 1 Rol. Abr. 617, Z. 4.

(1) But if a man had devised land in fee to J. S. and made his own daughter executrix, and had afterwards made a feoffment in fee to a stranger to the use of himself for his life, the remainder to his wife for life, the remainder to his own right heirs; and then the deviser had added and inserted these words in his will with his own hand, "I make my wife and my daughter my executrices of this my last will and testament," and had also put in and interlined a trustee in lieu of one named in the will, who was dead, and had inserted a new legacy to his wife; it is said that these acts had been no republication for the land; because the making new executors and giving a legacy do not affect the land, nor show any intent that this shall be his will for his land but only for his goods. *Montague v. Jeffries*, 1 Rol. Abr. 618, pl. 8. But the reporter adds a *dubitatur*.

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And Lord Hardwicke, in the case of *Carle v. Carle*¹, is reported to have said, that the addition of a codicil to a man's will would unquestionably operate as a republication of it. In the case of *Beckford v. Parnecott*², before-mentioned, the testator, after making the new purchase of lands, had the will read to him, and said nothing, but gave several legacies of goods, and caused them to be written and annexed thereto in a codicil; and Fenner, Justice, held, that the annexing the codicil thereto, was a new publication, though it respected goods only, for thereby the testator affirmed that it should be his will at that time. And in the case of *Alford v. Alford*³, which was a devise of a lease that was afterwards renewed by changing a life; it was held that a codicil, annexed to the will after the renewal, though it took no notice of the lease, was a republication of the will.

And a codicil, though not annexed to a will, is a republication, if it clearly relates to the subject matter of the will, thereby plainly evincing that the deviser contemplated that as his will, at the time of the codicil made. Thus, where V. after devising, devised his real and personal estate to trustees, on trust to vest the residue of his personal estate in lands of inheritance, purchased other lands and tenements, some of which rested on agreement only^b; and then by a codicil, reciting that he had made a will, thereby ratified and confirmed the will, and gave all the lands by him purchased since his will, to his trustees, to the same uses to which he had devised the bulk of his

¹ 3 Atk. 180; 2 Brow. Cha. Cas. 291, 511; 4 Ib. 2; 1 Ves. jun. 486, and Appendix, tit. "Republication."

² *Beckford v. Parnecott*; but other justices doubted; and see *infra*; Cro. Eliz. 493; S. C. 1 Rol. Abr. 618, pl. 8; and S. C. 1 Eq. Ca. 406; pl. 5.

³ *Alford v. Alford*, 1 P. Wms. 168; 2 Vern. 209.

^b *Acherley v. Vernon*, Comyns, 381; S. C. 9 Mod. 68; 2 Eq. Ca. Abr. 769, pl. 1; 1 Ves. 443; S. L. *Rider v. Wager*, 3 P. Wms. 329; and see Amb. 571; and 7 Durnf. & East, 482.

estate: it was, among other things, objected, that the codicil, being by a separate and distinct instrument, did not amount to a republication of the will, but it was decreed in Chancery, by Macclesfield, Chief Justice, and afterwards affirmed by the lords, that the testator's signing and publishing this codicil was a republication of his will, and both together made but one will; and that thereby, the lands contracted to be purchased, and all his real and personal estate, did well pass. So in the case of *Potter v. Potter*^c, where one devised all his lands, &c. and afterwards entered into an agreement for the purchase of other lands; and then made a codicil on a separate paper, reciting that, having in his will appointed several limitations of his estate, some of which were not agreeable to his intent, he revoked so much as should be found inconsistent with that codicil, ratifying and confirming the other parts. And Sir John Strange, Master of the Rolls, was of opinion, that, the latter codicil amounted to a republication, because it was an express declaration that the rest of his intent, not inconsistent therewith, should continue and be confirmed; and his Honor said, that it might be mischievous to hold, that no republication could be, but by the testator's taking the will in his hands and republishing it by an indorsement on it, or annexing the codicil to the will itself; the person intending to republish might be at a distance from the will itself, or might not have it in his power, by its being in custody of another: and the testator might know the substance, though he could not repeat the particulars.

And it is admitted on all hands, if there be in the codicil a general clause of confirmation of a will, as if the testator say, "I confirm my will," this would make such codicil amount to a republication: because it is the same as if the testator had republished every devise in the will over again. Thus where *D.* after devising all his estates, of what nature, kind and quality soever, purchased some cus-

^c *Potter v. Potter*, 1 Ves. 437.

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tomary estates, and surrendered them to such uses as he should by his will appoint^d; he then made a codicil, by which, reciting that he had made his will, he devised the same to C. D. &c. and then confirmed the gifts and devises contained in his said will, except what he had hereby altered, and desired that that writing might be annexed to and taken as a codicil to his will. And, *per Curiam*, the case of *Acherley v. Vernon* is in point, that the codicil, reciting that the testator had made his will, and ratifying and confirming it in the alterations before-mentioned, was a republication of the will, and both together made but one will, whereby the copyhold lands purchased after the will passed. And Lord Hardwicke, in the case of *Gibson v. Montford*^e, expressed his opinion that any other words that amounted to a confirmation of a will would do as well as words expressly confirming it; and therefore that a codicil, reciting that the testator had, by his will, given certain legacies, he revoked those legacies, and desired that writing should be a further part of his last will and testament, amounted to a republication to give the will operation upon lands subsequently purchased under a sweeping clause, "as to all the residue of the testator's real and personal estates of what nature or kind soever;" for his Lordship said, though there were not the words "I confirm my will," yet there were the words "I desire" &c. between which and an actual confirmation there seemed very little distinction.

Before any further observations are made upon this part of our subject, it will be proper to advert for a moment to the statute of frauds and perjuries, and consider what effect that statute had upon republications of wills relating to lands^f.

^d *Dec* on dem. *Bate v. Davy*, Cooper, 158; and see *Gibson v. Montford*, 1 Ves. 489, 493; and *Potter v. Potter*, 1 Ves. 437.

^e *Gibson v. Montford*, 1 Ves. 489, 493.
^f *Acherley v. Vernon*, Comyns, 381; 9 Mod. 78; 1 Ves. 442; Ca. T. Holt, 252.

And first, it has been held, that since that statute, no codicil can amount to a republication of a will of land, unless it comply with the forms thereby required, and be signed and published by the testator in the presence of three witnesses, who attest the same (1).

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And this statute extends to republications by parol, for the devising clause in the statute of frauds and perjuries puts an end to all parol republications of devises of lands, as the revoking clause did to all parol revocations; since the admitting them would be attended with all the inconvenience, mischief and fraud that the statute was intended to obviate. In the spirit of it, therefore, though not in the express words, it extends to these cases; for the effect of a republication is to devise, and the statute says, "that all devises of lands and tenements" shall be made as is therein directed. Thus Lord Hardwicke held, in the case of *Martin v. Savage*², that parol evidence of a republication could not now be admitted, as it would elude the statute of frauds. And therefore that a declaration by the testator "that his will was in the custody of S. and that it was and would be still his will," was not a republication of a will which had been revoked by a fine.

But, as constructive revocations are, in the exposition of the revoking clause of the statute of frauds, considered as out of its purview, because constructive revocations do not depend upon any parol declarations of the devisor, but are consequences of law arising from facts, the existence of which is capable of proof without recourse to the parol declarations of the devisor, not liable to misrepresentation, and independent of any intent to revoke expressed;

² *Martin v. Savage*, cited *tra*, per Churchill, in *Hall v. Dunch*, *supra*; but that doctrine overruled.
¹ Ves. 440; and see 9 Mod. 78; Barnard. 152; *sed con-*

(1) But note, this statute does not extend to copyholds. See *Burkett v. Burkett*, 2 Vern. 498.

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so, republications, wherever the analogy holds, seem like wise to be out of the statute, for, where the republication is a conclusion from facts, and does not depend upon parol declaration, the case is considered as not within the statute. As in the case of a testator's making two wills, the latter of which is repugnant to the former, and of course a revocation of it; yet, in that case, if the testator destroy the last and leave the first perfect and unobliterated, those acts taken together amount to a republication; because such transactions are not within the statute, not being exposed to the mischiefs it was intended to remedy.

So, with respect to devises of leasehold estates, the law of republication, it should seem, remains the same as it was before the statute of frauds. In the case of *Abney v. Miller*, where the fact of republication insisted upon was, that the testator, after renewing his leases, and being looking for another paper, and the person who was assisting him having taken up his will by mistake, he said, "that is my will;" not meaning to republish it, but to show that it was not the paper he wanted, Lord Hardwicke observed, that to make it a republication, there must be *animus republicandi* in the testator; from whence it may be inferred, that his Lordship was of opinion, that such a declaration, if made *animo republicandi*, would have been a sufficient republication^b.

Having said thus much upon the operation of the statute of frauds as to the republication of wills, it is now proper to recal the reader's attention to that part of our subject which relates to the annexing codicils to wills, which, without this digression upon the statute of frauds, might have involved him in some confusion.

We have already seen, that Lord Hardwicke was of opinion, that no express words were necessary to make a codicil, not annexed, a republication of a will, if the will were in effect confirmed by the codicil; and that therefore

^b See *Abney v. Miller*, 2 Atk. 599.

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a testator's desiring that a writing, in nature of a codicil, should be part of his last will and testament, amounted to a republication, as confirming the will¹. It remains for us here to observe, that if that doctrine be true, (and the great principle laid down as to testamentary dispositions, that, in favour of the power of devising, forms of expression shall generally be dispensed with, seems fully to warrant it,) every codicil, if executed according to the statute of frauds, will amount to a republication, though it relate only to personal estate, and be not annexed to the will; for every codicil is undoubtedly a further part of a man's last will, whether it be said so in such codicil or not, and, as such, furnishes conclusive evidence of the testator's considering his will as existing at that time. Consequently, then, it is a confirmation of the will, for it is in law annexed; all codicils being, in contemplation of law, fastened to the will, and considered as a part thereof. And Lord Hardwicke, in the case of *Gibson v. Montford*², seems to have been strongly inclined in favour of this opinion, that a codicil, although relating to personal property only, if so executed, would, though not annexed, amount to a republication of a will (1).

¹ *Gibson v. Montford*, 1 Ves. 485, 489. ² 1 Ves. 485.

(1) This doctrine, it must, however, be admitted, is considered as being contradicted by some cases of authority. But, upon a close inspection of them, they will, perhaps, be found to be of less weight than they have generally been considered, and be perceived to consist either of cases loosely reported, determined by consent, or to be mere *obiter dicta* not necessarily arising from the cases in which they were flung out by the court. The leading case of this description is that of *Litton v. Lady Falkland*, (3 Chan. Rep. 90; S. C. 2 Vern. 621; and see *Lord Lansdown's* case, as cited Comyns, 384;) where *L.* after making his will of all his lands out of settlement, foreclosed the equity of redemption of several mortgages, and purchased other lands of inheritance; then made two codicils, which he directed should be annexed to his will, giving

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And if the ground upon which the cases of *Acherley v. Vernon*, and *Potter v. Potter*, must ultimately stand, be

giving thereby some particular legacies. There were three witnesses to each codicil, but neither of the codicils were annexed to the will, that being in the country. And, *per Curiam*, consisting of Tracey, Trevor, Master of the Rolls, and my Lord Chancellor, the new purchased lands did not pass by the will, the codicils made afterwards not being annexed thereto, and therefore not amounting to a new publication. And this decree, it is said, was confirmed by the House of Lords. Again, where a codicil revoked a devise of an estate at Richmond, and directed it to be sold, and the money arising therefrom to be laid out in the purchase of freehold lands in Cheshire, to be settled to the same uses as directed by the will, touching the residue of the testator's personal estate; it was held by Sir Joseph Jekyl, Master of the Rolls, that this codicil did not pass lands purchased after the will made. *Cholmondeley v. Cholmondeley*, cited 1 Ves. 489. And Sir John Strange is reported to have said, in his judgment on the case of *Potter v. Porter*, cited 1 Ves. 489, that if the codicil in that case had only related to personal estate, it would not have done; but that was not the question there in judgment. But on these several authorities it is observable, that, as to the leading case of *Litton v. Strobe*, it is very loosely and imperfectly reported, both in the Chancery Reports and also in *Vernon*, and no notice is taken in the House of Lords of this part of the case; besides, the point upon which that case is made singly to rest, viz. the codicil's not being annexed to the will, is expressly overruled in the case of *Acherley v. Vernon*. As to the case of *Cholmondeley v. Cholmondeley*, that was a cause by consent, being heard before term; and not, therefore, of that weight in an important question that causes conducted adversely are. And though the Master of the Rolls observed, in the case of *Potter v. Potter*, that a codicil of personal estate only would not have done, yet that observation appears to have been made merely to distinguish that case from the case of *Litton v. Falkland*, upon the ground that, in the latter case, the codicil included an addition of some pecuniary legacies, and was therefore not intended to operate on or affect the land: whereas, in the former case, the whole purport of the codicil was to vary the limitations in some particulars, ratifying the will in all the rest. And Sir John Strange

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strictly examined into, it seems fully to justify the extension of the principle by which those cases were decided, to such cases as that now under our consideration; for the broad basis upon which those decisions must be supported is, that the testator, by acting, in the codicil, upon his will as to part of the dispositions therein, and ratifying and confirming it as to the part not acted upon therein, showed that he then conceived his will as existing, and had a reference to it in his own mind. The law, therefore, from its benignity to the testator, and its desire to further his intent, being unable to support the will as an existing instrument after revocation, rather than disappoint the testator, considers the codicil as a republication of it, giving it effect from that time as a new disposition. But why is this done? Because the *res gestæ* show that the testator, when he made his codicil, had a devising mind as to his real estate. Why, then, does not the *res gestæ*, in the case we are now discussing, furnish equal evidence of such intent? The executing a codicil clearly imports an idea in the testator's mind that a will is subsisting; and the complying with all the forms required by the statute of frauds, furnishes strong ground to suppose that the testator has a will, as to lands, in his contemplation; for, unless that be the case, there is no reason for his introducing those ceremonies which that statute imposes upon devisors of real property only. And if it should be said, that this is refining very much upon the principle, it may fairly be answered, that it is not carrying farther than

Strange went still further, by observing, that in *Litton v. Falkland*, though the codicil had been annexed to the will, yet he should have thought it not a republication as to the lands, the case of *Hutton v. Sympson*, 2 Vern. 722, showing, that the republication depended on the subject matter, not the annexing; a position by no means warranted by the decision in that case, as we shall by and by see.

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technical reasoning has done the doctrine of revocation, which so often prevails against the evident intent^m.

Now the effect of a new publication is, that all which the words in the will embrace at the time when the new publication is made shall pass thereby; or, to put it more clearly, when a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property the testator is seised of, and the persons named therein, at the date of the republication, just the same as if he had had such additional property, or such persons had been *in esse* at the time of making his will; the conclusion from that fact being that the testator so intended. The next consideration, therefore, upon a will so republished is, what the words of the will at the time of the republication import; for they will operate to their full extent at that time, just the same as if the testator had then made a new will. And therefore it was held in *Beckford v. Parnecott's* case, that the words in the will being "all the testator's lands in A." and the new-purchased lands lying in A. they were apt enough and sufficient to carry them, the will having been republished; nor could more apt words have been added thereto had a new one been made. So, if a man by his will gave "all his real estate," and afterwards purchase other lands, a republication will affect such newly-purchased lands; because the effect is the same, as to those lands, as if the testator had then made a new will, which, had he done, the word "all" would have included any lands that he had at that timeⁿ.

Upon the same principle it has been held, that by a republication, a person not in existence at the time of making a will, may be capable of taking by the will, if he be sufficiently described by the will. Thus, where a testator,

^m See Lord Mansfield's argument in the case of *Vernon, and Potter v. Potter, Carleton v. Griffin*, 1 Burr. 554; and Pow. Dev. 672. ⁿ And see *Acherley v. Vernon, and Potter v. Potter, supra.*

having two sons, Thomas and Joseph, gave 1,500 *l.* to his youngest son Joseph, and his real estate to his eldest son. Joseph died in the life-time of his father. The father having afterwards another son named Joseph, wrote a codicil at the bottom of his will, by which he confirmed the will, thereby taking notice, that since the last it had pleased God to give him another son, and gave a legacy of 500 *l.* to his son Joseph, over and above what he had given him by his said will. And it was held by Lord Chancellor Cowper, that Joseph took as well the 1,500 *l.* given by the will to his dead brother, as the 500 *l.* given him by the codicil; for that the making the codicil was a republication of the will, and amounted to a substituting the second Joseph in the place of the first, and was the same, in effect, as if the testator had made his will anew, and had written it over again, in which case the second Joseph must have taken °.

But the effect of such a republication extends no further than to give words, used in the original will, the same force and effect as they would have had if first written at the time of the republication. Consequently, if one devise lands by particular description, as by the name of *B. &c.* and then purchase new lands, and republish his will, the republication does not bring such new lands within the will, because it speaks only of the particular lands described.

And the rule is the same where the alteration of circumstances is in the devisee, and not in the property of the testator; for, in this case also, none can take by virtue of the republication in any other manner than as is expressed in the will. Therefore, where a devisee is intended in a will to take by descent, no republication will so affect that disposition as to enable him to take by purchase, not even though the words used, standing alone, may operate as

• *Perkins v. Micklethwaite*, C. J.; and *Cheney's case*, 5 1 P. Wms. 275; and see 3 Rep. 68.
Keb. 847, S. L. by North,

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words of purchase as well as of limitation. Thus, where a person devised lands to his daughter *B.* and the heirs male of her body, remainder over. *B.* died in her father's life-time, leaving issue a son, whom the grandfather took to his house and expressed great kindness for. Afterwards the grandfather made a codicil, by which he gave some part of a leasehold estate (which by his will was given to his daughter *B.*) to her son, and added another trustee for some charities he had given by his will. And on a question, whether the son of *B.* could take the estate devised to his mother in tail? it was held that he could not; for *B.* dying in the life-time of the testator, the heirs male of her body could not take by purchase, because these words were inserted to express the quantity and duration of the estate that *B.* was to take, and not as a description of the person of the heir¹.

And upon the same principle it had before been decided, that the word son, though capable of being applied in a will to a grandson as well as a son, when the testator knew that there was no son in being, could not be taken in that sense where the testator, by giving a legacy to his grandson, had evinced his intention to use the word in its proper sense². Thus, where *B.* devised his lands to his younger son *R.* and his heirs. *R.* the devisee died in the life-time of his father, and left a son, named also *R.* who had a legacy devised to him by the said will. *B.* afterwards annexed a codicil to his will, and then expressly published the will *de novo*, and verbally declared that his grandson *R.* should have the land as his son *R.* should have enjoyed it, if he had lived. And it was held by the Chief Justice, and Wyndham and Atkins, Justices of the Common Pleas, that the republication made it a new will, and the grandson

¹ *Simpson v. Hornsby*, *Brett v. Rigden*, Plowd. Pre. Ch. 432; S.C. 2 Vern. 343; and *Fuller v. Fuller*, 722; and see *Lord Lansdown's case*, cited Pre. Chan. Cro. Eliz. 422.
² See *Crook v. Brooking*, 440, 441; Comyns, 384; 2 Vern. 106, 107.

should take by the name of son. But a writ of error being brought on this judgment in the King's Bench, it was reversed; it being there said, that there being in the will itself a legacy devised to the grandson by that name, it was impossible, where they were so distinguished, to take the grandson to be meant by the name of the son; that, consequently, the republication could not operate to carry the devise to the grandson, and the declaration would not help it, that not being in writing^r (1).

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A codicil may likewise republish a will as to part only of the lands originally devised, as well as to the whole; for the nature of a codicil, as applied to this purpose, is to give effect to the will according to the words used, as they apply to the situation of the testator's property at that time. Thus, where a testator devised one moiety of his real estate to his eldest daughter and her heirs, and the other moiety to his youngest daughter in like manner. Afterwards, on the marriage of his eldest daughter, he covenanted to settle a moiety of his real estate to the use of himself for life, remainder to his daughter and her husband for their lives, remainder to the younger children of the marriage in tail, remainder to himself in fee. Then he made a codicil to his will, confirming his former will, subject to those marriage articles. And it being held that the articles were a revocation of the will as to a moiety, the question was, whether the codicil amounted to a republication of

^r *Steed v. Berrier*, 3 Mod. Vent. 340; T. Raym. 408; Rep. 318; Jones, 135; 1 2 Lev. 243; 2 Show. 63.

(1) *Note*.—In this case judgment was given in the Common Pleas by North, Wyndham and Atkins; Scroggs, then Judge, being then of a contrary opinion: and in the Court of King's Bench that judgment was reversed by the opinion of Scroggs, Jones and Pemberton; Dolbin being of a contrary opinion: so that, upon the whole matter, there were four judges against three, and the judgment of the three stands.

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the will, so as to entitle the married daughter to a moiety of the remaining moiety of the testator's estate; *et per Curiam*, the testator, by the codicil, confirmed his will, subject to the articles, which confirmation was a republication of his will, and as if he had written it over again, or had afterwards, for a valuable consideration, assigned over a moiety of his real estate to his eldest daughter, by which the moiety so disposed of did no longer continue any part of the testator's estate; so that the testator afterwards, by devising a moiety of his real estate, must be intended to have meant the remaining moiety only, and to have divided that moiety into moieties^a.

But as a codicil does not, in republishing, give any quality to a will that did not belong to it previous to its revocation, its operation being merely to set it up again in the same state and condition in which it subsisted from its inception, except as to making it efficient as far as the expression used therein will reach at the time of the republication; a devise, not properly executed at its inception, will not be helped by a codicil, although that be executed pursuant to the statute of frauds. Thus, where a testator devised his freehold lands to trustees, but the will had no witnesses; afterwards he made a codicil, which was duly executed, and subscribed by four witnesses, in which he recited the will; and it was held that the will was nevertheless void; for although there were three subscribing witnesses to the codicil, yet that would not support the will, unless it had been itself executed pursuant to the statute of frauds^b.

But we must be careful to distinguish cases of the above sort, in which there is a will and a codicil taking effect as distinct instruments, from the case of an entire instrument made and executed at several times, as to several distinct parts of the testator's property, but not attested

^a *Rider v. Wager*, 2 P. Wms. *et al.* Prec. Ch. 270; S. C. 329. ^b 2 Vern. 597; 3 Rep. Ch. 81.

^c *Attorney Gen. v. Barnes*

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until the whole is completed; for, in the latter case, the several parts will be considered as one writing, making together a will, and the attestation to the latter part will give validity to the former, although that alone relate to land, and there is no real devise in the latter part of the writing. Thus it was held, in the case of *Carleton v. Griffin*^a, that the testator's subscribing the sheet of paper in the presence of three witnesses, and then taking it in his hand and declaring it to be his last will and testament in their presence, and their attesting and subscribing it in his presence and in the presence of each other, was sufficient to give validity to the whole writing within the statute of frauds; the latter bequest not being considered by the testator, nor by the court, as a codicil, but as a memorandum added to his will, and the whole constituting one entire will, made at different times, and attested agreeably to the statute of frauds.

A will may also be republished by the testator's repeating, respecting the instrument, the ceremonies required by the statute of frauds to attend the publication of wills; and such republication will supply a defect, for want of capacity in the testator to devise, as well as an inability for want of a subject matter, upon which the will may attach. And therefore, if one having, under age, made a will of land, duly executed according to the statute, which is void by reason of his infancy, re-execute it after he come of age, with the circumstances required by the statute, this will render such a will valid^z. But where a man of full age declared, in the presence of several witnesses, that his will, made and duly published when he was under age, should stand, it was held that the will being void by reason of infancy at the time of the first publication, was not made good by the latter publication, because the will wanted

^a *Carleton v. Griffin*, 1 Burr. 549.

^z *Herbert v. Turball*, 2 Sid. 162.; 1 Keb. 589.

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the circumstances required by the statute, which never made any retrospect².

And such new publication may be made on the same day on which an infant comes of age³; for the hour of his birth is not material, there being no fraction of days.

Lastly, it is to be observed, there is no republication in equity that is not so in law, although the inaccuracy of reporters, who are very apt to say that a thing is so and so in equity, tends to mislead the student, and make him imagine that there is a distinction².

² *Hawe v. Burton*, Comberb. 84. Sid. 162, pl. 17; 1 Keb. 589, pl. 52.

³ *Herbert v. Turball*, 1² Cowp. 132.

BOOK V.

PART I.

OF THE MODE IN WHICH LANDS WILL DESCEND ON THE DECEASE OF THE OWNER.

CHAP. I.

OF DESCENTS.

HAVING treated of the several species of real property, the estates and interests which may be had in them, the means by which they may be transferred from one person to another, by the act of the party, together with the several subordinate incidents to each of those heads; we now come to the **LAST** subject of inquiry proposed to be considered, namely, the manner in which they will descend upon the owner's involuntary dereliction of them by his decease. DESCENTS.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed, says Sir William Blackstone^a, the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent imitations are to work. Thus a gift in tail, or to a man and the heirs of his body,

^a 2 Com. 201.

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is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, other son alone, or all the sons together, shall be his heir, this is a point that we must result back to the standing law of descents in fee-simple to be informed of.

In order, therefore, to treat a matter of this universal consequence the more clearly, it will be proper to inquire into,

I. WHAT PERSONS ARE CAPABLE OF TAKING BY DESCENT.

II. THE RULES OR CANONS BY WHICH THE MODE OF DESCENT IS GOVERNED.

III. THE MEANS BY WHICH THE ORIGINAL COURSE OF DESCENT MAY BE DIVERTED.

IV. HOW A DESCENT MAY BE PREVENTED, AND THE HEIR MADE TO TAKE AS PURCHASER.

I. WHAT PERSONS ARE CAPABLE OF TAKING BY DESCENT.

GENERALLY speaking, all persons are capable of taking lands by descent, according to the rules of law, unless disabled by some rule of national policy: these alone, therefore, need be mentioned.

Monsters.

The first description of persons usually mentioned in the books as incapable of taking by descent, is a monster, which not having the shape of mankind, but in part bearing the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, although brought forth in marriage; but, although it hath deformity in any part of

its body, yet if it hath human shape, it may be heir^a. This is a very ancient rule in the law of England^b; and the Roman law agrees with our own in excluding such births from successions^c; but yet accounts them children in some respects, where the parents, or at least the father, could reap any advantage thereby^d; (as the *jus trium liberorum*, and the like) esteeming them the misfortune rather than the fault of that parent. But our law will not admit a birth of this kind to be such an issue as shall entitle the husband to be tenant by the curtesy^e, because it is not capable of inheriting. And therefore if there appears no other heir than such a prodigious birth, the land shall escheat.

2. Bastards are also incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur*^f. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser: and therefore if there be no other claimant than such illegitimate children, the land shall escheat to the lord^g. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father^h: and also, if the father had no lawful wife or child, then, even if the

Bastards.

^a Co. Lit. 7.

^b *Qui contra formam humani generis converso more procreantur, ut si mulier monstruosum vel prodigiosum enixa sit, inter liberos non computantur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos communerari: et, si membra*

sint inutilia aut tortuosa, non tamen est partus monstruosus. Bract. l. 1, c. 6, & l. 5, tr. 5, c. 30.

^c Ff. 1, 5, 14.

^d Ff. 50, 135; Jenk. Cent. 9, s. 63.

^e Co. Lit. 29.

^f Ibid. 8.

^g Finch. Law, 117.

^h Nov. 89, c. 8.

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concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance¹; and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father was not². But our law, in favour of marriage, is much less indulgent to bastards.

There is indeed one instance, in which our law has shown them some little regard; and that is usually termed the case of *bastard eigne* and *mulier puise*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a *mulier*, or, as Glanvil¹ expresses it in his Latin *filius mulieratus*; the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigne*, and the younger son is legitimate, or *mulier puise*. If then the father dies, and the *bastard eigne* enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puise*, and all other heirs, (though minors, femmes covert, or under any incapacity whatsoever) are totally barred of their right². And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard's* life, and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his life-time. 3. Because the canon law (following the civil) did allow such *bastard eigne* to be legitimate on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circum-

¹ Nov. 89, c. 12.² Cod. 6, 57.¹ I. 7, c. 1.² Lit. s. 309; Co., Lit. 244.

stanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shown to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all^a.

But we must observe, that in order to bar the *mulier* and his issue, there must not only be a dying seised (either by a natural or civil death, and that of lands in fee-simple) by the bastard, but also a descent cast; and consequently, where these two requisites do not concur, the *mulier* or his issue may enter; and, therefore, if the bastard die seised without issue, and the lord enter by escheat, the *mulier* is not barred, there being no descent^o. But if the bastard had entered, and the *mulier* died without issue, but leaving his wife *enseint*, and then the bastard had issue and died seised, after whose death the posthumous issue of the *mulier* was born, his right was barred, and he was not permitted to enter, as there were both a dying seised and a descent, and consequently the right of the bastard established. But had the bastard died seised without issue, but leaving his wife *enseint*, and then the *mulier* had entered, and afterwards the son of the bastard had been born, such son could not have entered on the *mulier*, he not being barred, there being no descent cast when the *mulier* entered. For though the law gave the estate to the issue of the bastard when both these requisites concurred, as a punishment for the *mulier's* negligence, &c. yet when both these requisites did not concur, the issue of the bastard had no title at all (1).

^a Lit. s. 400.

^o See Mich. 37 Hen. 4. pl. 1.

(1) See Co. Lit. 244, a. and 248, b; 8 Co. 101, a and b; Gilb. Ten. 27; Brooke, Descent, 41; 2 Black. Com. 248; c. 15; Plowd. 57 a. 372, a; and *quære*, as to the law at this day with respect to the posthumous issue; for if the liberality of the times should consider such issue as born, it

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And as bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred, and consequently can have no legal heirs but such as claim by a lineal descent from himself. And therefore if a bastard purchases land and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee ^p.

Aliens.

3. Aliens also are incapable of taking by descent, or inheriting^r, for they are not allowed to have any inheritable blood in them, rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore if a man leave no other relations but aliens, his land shall escheat to the lord. As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase^r, they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden^s, because they have not in them any inheritable blood. And farther, if an alien be made a denizen by the king's letter patent, and then purchases lands, (which the law allows such an one to do) his son born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father

^p Bract. l. 2, c. 7; Co. Lit. 244.

^r Co. Lit. 8.

^s Ibid. 2.

^t Ibid.; 1 Lev. 59.

it would perhaps deem it a sufficient descent. Watk. Desc. 218.

before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not¹.

Sir Edward Coke also holds², that if an alien cometh, into England, and there hath issue two sons, who are thereby natural-born subjects, and one of them purchases land, and dies, yet neither of these brethren can be heir to the other; for the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law; not only from the rule before cited, that *cestui que droit inheriter al pere, droit inheriter al fils*; but also because we have seen that the only feodal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some of his ancestors: but in this case as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum*; that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath since been overruled³: and it is now held for law, that the sons of an alien, born here, may inherit to each other; the descent from one brother to another being an immediate descent; and reasonably enough upon the whole; for, as (in common purchases)

¹ Co. Lit. 129.² 1 Inst. 8.³ 1 Ventr. 413; 1 Lev. 59;

1 Sid. 193.

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It is also enacted, by the statute 11 & 12 Will. 3, c. 6, that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father or mother, or other ancestor, by, from, through or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis, the elder brother of John Stiles, be an alien, and Oliver, the younger, be a natural-born subject, upon John's death without issue, his lands will descend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the statute of King William, this new-born child might defeat the estate of his uncle Oliver: Wherefore, it is provided by the statute 25 Geo. 2, c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being, and capable to take as heirs at the death of the person last seised; with an exception, however, to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descents by the common law.

Persons attainted.

4. By attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable. But great care must be taken to distinguish between this species of escheat to the crown, and forfeiture of lands to the king, which by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded

together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law¹, as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any seigniorship or lordship paramount²: but being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised³), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal, on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and distinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason for ever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat⁴, as it would have done to the heir of the felon, in case the feudal tenures had

¹ LL. Aelfred, c. 4; LL. Canut. c. 54.

² 2 Inst. 64; 1 Salk. 85.

³ 3 Inst. 15; Stat. 25 Edw. 3, c. 2, s. 12.

⁴ 2 Inst. 36.

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Hitherto we have only spoken of estates vested in the offender at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still further. For the blood of the tenant being utterly corrupted and extinguished, it follows not only that all that he has now shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may further illustrate the distinction between forfeiture and escheat. If, therefore, a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life; but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit^d. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As, where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood: here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives^e.

There is yet a further consequence of the corruption and extinction of hereditary blood, which is this, that the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements

^c Somner, 53; Wright Ten. 118.

^d Co. Lit. 13.

^e 3 Inst. 47.

to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel, which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony^f. But by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestor^g, at least on the part of their attainted father.

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender, but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If, therefore, a man hath a son, and is attainted, and afterwards pardoned by the king, this son can never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so; but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children^h.

In this there is, however, a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice, and therefore we have seen that an alien elder brother shall not impede the descent to a natural-born younger brother.

^f Van Leeuwen, in 2 Feud. 31.

^g Co. Lit. 391.

^h Ibid. 392.

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But in attainders it is otherwise; for if a man hath issue a son, and is attainted and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir: neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood¹. So if a man hath issue two sons, and the elder, in the life-time of the father, hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son, for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord². Sir Edward Coke in this case allows¹, that if the ancestor be attainted, his sons born before the attainder may be heirs to each other, and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father; but he makes a doubt (upon the principles before-mentioned, which are now overruled^m) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

Upon the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take or to transmit any feudal property, is blotted out, corrupted

¹ Co. Lit. 8.² Dyer, 48.¹ Co. Lit. 8.^m 1 Hale, P. C. 357.

and extinguished for ever; the consequence of which is, that estates, thus impeded in their descent, result back and escheat to the lord. DESCENTS.

This corruption of blood, thus arising from feudal principles, but perhaps extended further than even those principles will warrant, has been long looked upon as a peculiar hardship; because the oppressive parts of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most equitable consequences, namely, that the children should not only be reduced to present poverty, (which, however severe, is sufficiently justified upon reasons of public policy), but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies created by parliament, since the reign of Hen. 8, it is declared that they shall not extend to any corruption of blood: and by the statute 7 Anne, c. 21, (the operation of which is postponed by the statute 17 Geo. 2, c. 39), it is enacted, that, after the death of the late pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself: which provisions have indeed carried the remedy further than was required by the hardship above complained of, which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor^a.

As by the feudal law the freehold could not be vacant, or, as it was termed, *in abeyance*, there must have been a tenant who was capable of fulfilling the feudal duties, and against whom the right of others might be maintained. An infant *in ventre sa mere* was not, on these occasions, considered as *in esse*, and consequently could not be considered as a tenant. On the devolution, therefore, of an estate, the then-born person who was, at such devolution,

*Infants en
ventres ses meres.*

^a See 2 Blac. Com. 256.

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entitled, (as, for instance, the brother of the deceased) was permitted to succeed; but though the issue, while *in ventre sa mere*, was not regarded as *in esse*, yet, (when afterwards born) as it was the person whom the law would have pointed out to enjoy the inheritance of his father, had it been *in esse* when he died, and as the reason for the entry of the uncle had now ceased, since the issue became capable of holding the hereditaments descended, and of fulfilling those duties by his guardian, such issue was permitted to enter upon the uncle, and to enjoy the estate^o.

But now by the statute 10 & 11 Will. 3, c. 16, it is enacted, that posthumous children shall be capable of taking in the same manner as if born in the father's lifetime.

And it is now laid down, apparently as a fixed principle, that a child *in ventre sa mere* shall be considered as absolutely born^p (1).

^o See Watk. Desc. c. 4. 1 Durnf. & East, 633, 634;
^p *Miller v. Turner*, 1 Ves. and Watk. Desc. 212, n. (o).
 85, 86; *Roe v. Quartley*,

(1) The statute of 10 & 11 Will. 3, c. 16, has expressly provided for certain cases with respect to remainders; and the light in which that statute has been taken, is very favourable to the posthumous issue; inasmuch that the distinction mentioned between a remainder's being vested or not vested in interest, before the birth of such issue, seems now, if not absolutely, yet certainly in a very great degree, to be done away; such child being considered as existing, and the remainder allowed to vest in him in his mother's womb. See 2 Blac. Com. 169, ch. 11; Co. Lit. 11, b, note (4), and 289, a, note (3); Watk. Desc. 213. But with respect to this statute, we may observe, that it seems to be in favour of such posthumous children only who take by way of remainder, and has nothing to do with any remainders limited to others dependant upon their birth. And as it thus seems to relate only to such posthumous children who take the remainder over, so it is expressly confined to the limitation of a remainder, and has

II. THE RULES OR CANONS BY WHICH THE MODE OF DESCENT IS GOVERNED.

As the common law doctrine of inheritance depends greatly upon the nature of kindred, and the several degrees of consanguinity, it will be proper, previously to entering upon this subject, to state as briefly as possible the true notion of this kindred or alliance in blood¹.

Consanguinity, or kindred, is defined by the writers on these subjects, to be *vinculum personarum ab eodem stipite descendendum*, the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him

¹ See 2 Blac. Com. 202.

has nothing to do with a descent. The doctrine, therefore, relative to a posthumous child taking by descent, remains as at common law. See Watk. Desc. 213; Co. Lit. 298, a, note (3).

As to the intermediate profits from the death of the ancestor to the birth of a posthumous heir, it seems that such heir is not entitled to them; but they shall be enjoyed by the person seised of the estate for the time being, to his own use; as if the uncle enters on the death of the father, and afterwards a son be born, the uncle shall be entitled to the profits from the time of the father's death to the birth of the son. See Co. Lit. 11, b, note (4); see also 3 Wils. 546; 3 Atk. 203.

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in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil^r, and canon^a, as in the common law^t.

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods^a is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate^w. This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ab eodem stipite descendendum*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they did not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirpes*, or root, the *stirpes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles had two sons, who have each a numerous issue; both these issues are

^r Ff. 38, 10, 10.

^a Decretal. l. 4, tit. 14.
Co. Lit. 23.

^a Ibid. 12.

^w See 2 Blac. Com. 203, and notes there.

lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanguineos. DESCENTS.

We must be careful to remember, that the very being of collateral sanguinity consists of this descent from one and the same common ancestor. Thus Titius and his brother are related; why? because both are derived from one father: Titius and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For, indeed, if we only suppose each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more; (and, without such a supposition, the human species must be daily diminishing) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more. And, if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

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The method of computing these degrees in the canon law, which our law has adopted, is as follows : We begin at the common ancestor, and reckon downwards ; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus, Titius and his brother^{*} are related in the first degree ; for from the father to each of them is counted only one ; Titius and his nephew are related in the second degree ; for the nephew is two degrees removed from the common ancestors ; viz. his own grandfather, the father of Titius. Or, (to give a more illustrious instance from our English annals[†]) king Henry the Seventh, who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus*, therefore, in the Table of Consanguinity represent king Richard the Third, and the class marked (e) king Henry the Seventh. Now their common stock or ancestor was king Edward the Third, the *abavus* in the same table ; from him to Edmond duke of York, the *proavus*, is one degree ; to Richard earl of Cambridge, the *avus*, two ; to Richard duke of York, the *pater*, three ; to king Richard the Third, the *propositus*, four ; and from king Edward the Third to John of Gaunt (a), is one degree ; to John earl of Somerset (b), two ; to John duke of Somerset (c), three ; to Margaret countess of Richmond (d), four ; to king Henry the Seventh (e), five. Which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other ; reckoning a degree for each person both ascending and descending), these two princes were related in the ninth degree ; for from king Richard the

^{*} See Tables I. II. annexed.

[†] See 2 Blac. Com. 207.

third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the Third, the common ancestor, four; to John of Gaunt, five; to John earl of Somerset, six; to John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the Seventh, nine.

The nature and degrees of kindred being thus in some measure explained, we may proceed to notice the several rules or canons of inheritance, according to which estates are transmitted from the ancestor to the heir, at the same time remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations (1).

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*; but shall never lineally ascend. To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis*. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor, as the eldest son or his issue who must by the course of the common law be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should

(1) See 2 Black. Com. 208, whence the student will perceive the rules and explanations here given, are extracted, as the most familiar source from which any material assistance could be derived. For various other parts of the present subject, particularly that which treats of the seisin of an ancestor, the author acknowledges himself to be indebted to the learned and valuable Essay on the Law of Descents by Mr. Watkins, to whose industry and abilities the author has frequently had occasion to offer his acknowledgments in the course of the present undertaking.

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happen to die immediately, would in the present circumstances of things be his heir; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner to such brother, or nephew, or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous child².

We must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold^a: or unless he hath had what is equivalent to corporeal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson^b, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And therefore all the cases, which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety hath succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted to the lord's court (as is still the practice in Scotland) and there received his

^a Bro. tit. Descent, 58; and see Doct. and Stud. 1. Dial. c. 7; Co. Lit. 14.

^a Co. Lit. 154 and see Watk. Desc. 36, 58.

^b Co. Lit. 14.

seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers; till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which, if disputed, was afterwards to be tried by those peers) or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin, therefore, of any person, thus understood, makes him the root or stock from which all future inheritance by right of blood must be derived; which is very briefly expressed in this maxim, *seisina facit stipitem*^c (1).

The seisin of the ancestor being so essential a basis of descents, it will be proper to inquire shortly what is deemed a sufficient seisin of the ancestor, to enable him to transmit his estate by descent. This may be considered,

1. Where such ancestor takes the estate by purchase, and
2. Where he takes by descent from *his* ancestor.

Where a person takes immediately by purchase, and the hereditaments purchased are corporeal, he generally, and indeed always, if the instrument by which they are conveyed is founded upon feudal principles, at the same time acquires or receives the corporeal seisin or possession. If they are incorporeal hereditaments, and especially if they are reversions or remainders, of which no such corporeal seisin can be had, then the property therein, whether it be vested in possession, or in interest only, or merely contingent, is fixed or settled in such purchaser at the time of such purchase made^d. But, whether the hereditaments purchased be corporeal or incorporeal, or in possession or reversion, yet, on such purchase being com-

Seisin of the ancestor, where he takes by purchase.

^c Flet. l. 6, c. 2, s. 2.

^d See Watk. Desc. 9, et seq.

(1) See of the necessity of an actual seisin of the ancestor to give title by descent; how it may be obtained, and how defeated by endowment, &c. Watk. Desc. ch. 1.

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pleted, and the property in them being transferred, such purchaser immediately becomes the stock of descent; and the hereditaments so purchased become transmissible to his own heirs^e. And a remainder of inheritance, whether vested or contingent, is transmissible to the heirs of the person to whom it is limited^f, equally with an estate which is vested in possession. For it matters not whether there be or be not a capacity in such remainder of vesting in possession, if the possession were to become vacant; (for in either of these cases it shall be descendible;) but if a remainder be limited so as to be contingent as to the person to whom it is limited, here, while there is a want of capacity in such person to receive it, during such contingency, the remainder cannot possibly be inheritable; for as there is no person who can take, there is no person from whom it can be derived^g. So also with respect to executory devises: if, or so soon as, there is a person capable of taking the expectant fee, should the anterior one happen to determine; then, or so soon, it is so far vested or fixed in such person as to become transmissible to his heirs in a regular course of descent^h. So, likewise, as to mere possibilities; they are descendible to the heirs of the persons entitled to them, in the same manner as remainders or executory devisesⁱ.

And therefore, in the case of a purchaser, the question is, whether the property intended to be conveyed, limited or transferred, was legally vested or fixed in such purchaser; or whether he was ever capable of taking such future interest during the continuance of the particular estate or anterior fee, should it chance to have determined or fallen; and not whether he ever had the corporeal pos-

^e Watk. Desc. 10.

^g See Watk. Desc. 13.

^f See *Hodgson v. Rawson*, 1 Ves. 47; *Peck v. Parrot*, Ibid. 237; *Erel v. Wallace*, 2 Ibid. 119; *Chauncey & al. v. Graydon, & al.*; 2 Atk. 621.

^h Watk. Desc. 13; and authorities there cited, n. (o) and (p).

ⁱ Ibid.

session of those which are corporeal, or what is equal to corporeal possession in incorporeal hereditaments, (as receipt of rent, presentation to advowson, &c.) For, in many cases, if such property be fixed by purchase, though the ancestor so purchasing had never gained any actual seisin in fact^k, yet his heir may inherit.

Again, with respect to copyholds; if a surrender be made to the use of *A.* in fee, and *A.* die before admittance, yet the heir of *A.* shall be admitted; and upon such his admission, he shall be in by descent from the surrender to which the admittance relates^l. So also, in the case of an exchange; if both parties die before either enter, the exchange is void: but if one enter, and the other die before entry, yet his heir may enter, and shall be in by descent^m. So, in case of a devise to *A.* in fee, and *A.* die after the deviser, without having ever made any actual entry himself; yet his heir may enter, and shall take by descentⁿ, though the devisee had but a seisin in law^o. So also, on a devise by custom before the statutes of Hen. 8, the heir of the devisee might have had a writ of *ex gravi querula*, if the devisee had died after the deviser, and before entry^p.

Also, if a person takes a remainder at the time of its creation, otherwise than by way of use or devise, the seisin is delivered to the particular tenant of the freehold; which seisin shall enure and give effect to all the remainders limited thereon^q. And in case a remainder be limited by way of use or by devise^r, the remainders so limited, be-

^k *Geary v. Bearcroft*, Carter, 57; *Watk. Desc.* 15, 18, 52.

^l See *Vaughan d. Atkins v. Atkins*, 5 Burrow. 2786; and see *Gilb. Ten.* 288; *Benson v. Scott*, Carthew, 275; 1 *Watk. Copyh.* 103; *Ibid. Desc.* 32.

^m See *Ibid.*; *Perk. s.* 285, 286; and 1 *Rep.* 98, b.

ⁿ See *Hulm v. Haylock*, Cro. Car. 200.

^o See *Co. Lit.* 111, a. 240, b; 3 *Bl. Com.* 168, c. 10; *Watk. Desc.* 33.

^p *Ibid.*; *F.N.B.* 199, 200.

^q See *Lit. s.* 60, 450; see also 1 *Vent.* 260-1; and 2 *Bl. Com.* 167, c. 11.

^r *Watk. Desc.* 7.

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In the case also of equitable interests, if the ancestor executes articles of purchase, and dies before such purchase be completed, a court of equity will compel such completion in favour of the heir of the purchaser; the vendor being considered as a trustee for the vendee; and the estate shall, in the contemplation of such court, be deemed in such purchaser from the time of the execution of the articles, so as to be capable of being devised by such ancestor, or inheritable by his heir (1). Thus, in case the ancestor takes by purchase, he may be capable of transmitting the property so taken to his own heirs, without any actual possession in himself; but if the ancestor himself takes by descent, it is absolutely necessary, in order to make him the stock or *terminus* from whom the descent should now run, and so enable him to transmit such hereditaments to his own heirs, that he acquire an actual seisin of such as are corporeal, or what is equivalent thereto, in such as are incorporeal; or that he exert some

* See auth. *Watk. Desc.* *Gilb. Ten.* 12; *Co. Lit.* 11, b. 4, 122. 15, a. 40, a. 239, b; *Watk.*

See 2 *Blac. Com.* 209; *Desc.* 36, n. (1).

(1) See *Greenhill v. Greenhill et al.* *Preced. Chanc.* 320; *Potter v. Potter*, 1 *Ves.* 437; *Hinton v. Hinton*, 2 *Ves.* 631; *Shep. Touchst.* 429, note (2), edit. of 1791; *Langford v. Pit*, 2 *P. Wms.* 629; *Green v. Smith*, 1 *Atk.* 572; But we must not confound these equitable interests with estates at common law; for such an interest as mentioned above, is incapable of an actual seisin. It is stated from its analogy to the cases preceding it, and not as furnishing a rule for common law estates. For on the completion of the agreement by conveyance to the heir, such heir would undoubtedly take by purchase at common law; however he may be considered as being in by a court of equity. See *Watk. Descent*, ch. 1. 5; *Goodright d. Alston v. Wells et al.* *Dougl.* 771.

act of ownership over such as are in reversion or remainder expectant upon an estate of freehold. For otherwise they shall descend, not to his heirs, (as such,) but to those who shall be able to show themselves the right heirs of such first purchaser, without any regard to any intermediate person who was never in the actual possession of such hereditament.

Immediately, then, on the death of the ancestor, (whether such ancestor had taken by descent or by purchase,) or the intermediate person to whom the estate devolved, (whether such person had an actual seisin or not), the law casts the estate upon the heir^a. And as he has thus the right, it gives him also a presumed possession or seisin; (estates in possession are here spoken of): on the death of the ancestor, as the possession would be otherwise vacant, the law supposes or presumes it to be in the heir, and this presumptive possession or seisin is what is termed a possession or seisin in law. And we must be careful to remark, that this possession or seisin in law in the heir, is, as we have stated it, no more than supposed or presumed; for if there be an actual possession or seisin, either by right or by wrong, in any other person, such actual possession or seisin rebuts the presumption or seisin in the heir^a. But if, on the death of such ancestor, the hereditaments descending were in lease for years, then the possession of the lessee for years gives, not a seisin or possession in law, but a seisin or possession in deed to such heir^b.

If such hereditaments were leased or limited for life, or in tail, so that an estate of freehold was created, then the

^a See 2 Blac. Com. 201, *Newman v. Newman*, 3 Wils. c. 14; 3 Ibid. 168, c. 10; 526.
Co. Lit. 15, b. 237, a, b;
^b See Gilb. Ten. 22; 4
see 4 Co. 58, a, b. case Rep. 58, a, b; Co. Lit.
of *Sadlers*; Gilb. Ten. 18; 266, b, note (1), 277, a.
see also *Symonds v. Cud-*
more, Carthew, 260; and
^c See post.

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seisin or possession in deed is in such particular tenant. And though a person is said to be seised of such reversion or remainder thus expectant upon an estate of freehold, and such seisin is often styled a seisin in law; yet by the seisin of such reversioner or remainder-man is meant, in reality, no more than that such reversioner continues, or that such remainder-man is placed, in the tenancy, and that the property is fixed in him. The particular estates and the reversion or remainders over, form, in law, but one estate; and, consequently, by delivering the possession to the person first taking, it extends to all. All, therefore, may be said to be seised, as they are all placed in the tenancy, and as the property is fixed in all² (1).

But although the seisin of the heir on the death of his ancestor is *prima facie* presumed, yet if, on the death of the ancestor, a stranger enters before the heir, and, in legal language, abates, then the actual possession of the abator,

² See Watk. Desc. 277, *et seq.*

(1) We also say that a remainder is vested, by which, we only mean that it is fixed in him, and not contingent. The term vested, is allusive to the improper investiture of antiquity, which required a subsequent actual seisin to complete it; and it is so used, from the analogy such fixture of property in the remainder-man bears to that of the person so invested, and not from any absolute propriety of expression. Thus, improper investiture appears to have been an inchoate form of delivering seisin, and required, as we have said, an actual livery to complete the transfer; and to have arisen from a particular mode of such livery, that of investing the tenant, or clothing him with a robe or vest. See Sullivan, l. vi. p. 59, &c.; 2 Bl. Com. 366. The vesting, therefore, of an estate, was originally and properly applicable to that of the particular tenant, (or tenant in possession), to whom the actual seisin was given, since it was clearly no other than a symbolical livery. When we speak, then, of a seisin in deed, or in law, it is allusive to the actual possession of the premises; and not with reference to the interest of the reversioner or remainder-man, or their being placed in the tenancy.

though by wrong, shall rebut the seisin or possession in law of the heir^a. So, had the ancestor himself been disseised, and died before a subsequent entry, the actual seisin would be in such a disseisee, and the heir had but a right.

But although the estate descending to the heir be sufficiently vested in him before his own actual entry or seisin, as to many purposes^b, yet it is absolutely and indispensably requisite that he be actually seised of the hereditaments so descended, in order to make himself the stock of descent or *terminus*, and make such hereditaments transmissible to his own heirs. For if he die before entry or other actual seisin or possession obtained, the brother of the half-blood shall succeed to the inheritance, in exclusion of the sister of the whole^c; as the person now claiming must make himself heir to him who was last actually seised by entry, receipt of rent, presentation to advowson, &c. or to the original purchaser or mesne grantor, as the case may require^d.

The most common and direct method of obtaining an actual seisin, when hereditaments descend to a person, and such hereditaments are of a corporeal nature, is to make an actual entry, which must be of some part of the lands in each county where the lands are situated; and in order to constitute a legal entry, the person so entering, must enter with that intent, and express his intent to be such^e, or manifest such intention by some overt act; for otherwise there cannot be that notoriety of possession which the law so justly requires in cases of this nature.

But it is not absolutely necessary that the possession be gained by the actual entry of the very person to whom the lands descend: it may be gained by the entry or posses-

How seisin to be obtained.

^a Co. Lit. 277, a; Plowd. 137, b.

^b See Watk. Desc. [40].

^c *Non jus, sed seisinam facit stipitem*; see 2 Blac. Com. 228, 312.

^d Watk. Desc. [42].

^e See Robins. Inherit. 33, note (i); Plow. Com. 92; Co. Lit. 245, b. 368, a.

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sion, of the guardian or lord of the infant heir^f; or by the possession of the ancestor's lessee for years, tenant by *elegit*, statute-merchant or statute-staple^g. So if a stranger enter into the lands of an infant and take the profits, he shall be considered, both at law and in equity, as entering as guardian, and he shall be accountable as such^h; and this, though the heir dies before the day of payment of rentⁱ. And as the possession of the lessee for years or at will is that of the lessor^k, so it seems that the heir may make such leases for years or at will before his own entry, and so acquire an actual seisin by them; for it appears upon the whole, pretty clear, that the possession in law only of the heir is sufficient to enable him to make such leases, without any actual entry by himself; as where the lands descend to such heir, and his possession be unrebuted by the actual seisin of any other person; but if another abates, so as to rebut such presumed or legal seisin, the heir having now neither a seisin in law or deed, and consequently no possession at all, cannot possibly be able to make any leases of such lands^l.

So if a remainder be limited on an estate for years, the possession of the particular tenant is the possession of the remainder-man^m.

^f Dyer, 291-2, pl. 69; Co. Lit. 15, a, note (4); 29, a, note (3); 3 Co. 42, a; 9 Ibid, 106, a; and see *Newman v. Newman*, 3 Wils. 516.

^g Co. Lit. 15, a. 243, a; 3 Co. 42, a; Kitch. 109, b; *Batmore v. Graves*, 1 Vent. 261.

^h See Co. Lit. 89, a, b; *Morgan v. Morgan*, 1 Atk. 489; *Dormer v. Fortescue*, 3 Atk. 130.

ⁱ See Moore, 126, ca. 272; Co. Lit. 15, a; and 3 Atk. 469.

^k Ibid.; and see 3 Wils. 516-528; Buller's N.P. 104; also 1 Wils. 176, and *Brediman's case*, 6 Co. 57, a. 59 a; Co. Lit. 290, b, note (1). 330, b, note (1).

^l See Plowd. 87, 137, 142; Shep. Touch. 269; *Berrington v. Parkhurst*, 2 Strange, 1086; and see Gilb. Ten. 159-60; Watk. Desc. [51].

^m See (of freeholds) Lit. sec. 60; and Co. Lit. 49, a, b. 239, b, note (2); 2 Blac. Com. 167, ch. 11.

Actual seisin may also be gained by the possession of a tenant by copy of court-roll, whether such tenant be for years, life, or in fee^a. For copyholds were originally, and yet are in the eye of the law, only tenancies at will; the freehold remaining in the lord^o: and of copyholds there may be a *possessio fratris* before admission^p. For it is the entry and not the admittance which makes a *possessio fratris* of copyholds^q.

So the entry of one coparcener, joint-tenant or tenant in common, is sufficient to make *possessio fratris* in the others who did not enter, to the exclusion of the half-blood^r (1). So the possession of one is the possession

^a See 9 Rep. 105, b. 106,

^a.
^o See 3 Levinz, 94; Gilb. Ten. 360; 4 Co. 22, a; Co. Copyh. sec. 14; Tracts, 11; and see *Stephenson v. Hill*, 3 Burr. 1273-9.

^p *Dyer*, 291, pl. 69; *Reeve v. Malster*, Cro. Car. 411; *Clarke v. Penyfether*, 4 Co. 22, b; *Brown's case*, Ibid. 23, b; Gilb. Ten. 159.

^q See *Fox v. Smith*, 1 Freem. 45.

^r *Smales v. Dale*, Hob. 120; S. C. Moore, 868, pl. 1201; and see *Hemley v. Brice*, Moore, 546, ca. 729; see also *Ballard v. Ballard*, Dyer, 128, pl. 58; see further, 1 Lord Raym. 622; *Fisher v. Wigg*, Co. Lit. 373, b; 5 Burr. 2607; *Faireclaim d. Empsom v. Shakleton*, Jenk. Cent. 42, pl. 79.

(1) If there are several coparceners, and one only present to an advowson, it will not put the others out of possession; but the possession of one, by her clerk, shall be the possession of all; so that the others may bring a *quare impedit*. *Dyer*, 259, pl. 20; 2 Inst. 365; F. N. B. 34; Co. Lit. 243, a. And such also seems the law as to joint-tenants. 2 Inst. 365; Co. Lit. 186, b. But see *contra*, Bro. *Quare Imp.* 52; F. N. B. 35 W. Yet the law and the reason of the thing seem in their favour. And it is said to be the same as to tenants in common. See 1 Ander. 63; but *quare* as to this; and see 17 Vin. 405, Presentm. (K. c.) pl. 2; and Bro. *Present. al Eglise*, pl. 1; Watk. Desc. 547.

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of the other to several others purposes^o. But the entry of one will not vest the estate and possession in the others, if it would be for their disadvantage^o.

So the entry of a younger brother or sister, (although they are but of the half-blood,) is the possession of the eldest brother, or other sisters^u. And it seems that such entry will make *possessio fratris vel sororis* in the heir at law, even though it be to the exclusion of the very person who enters^x.

And as a possession may, in many cases, be gained by the entry of an indifferent person in his name, and to his use, who has right, and this often by mere oral authority, and sometimes without any expressed authority at all (1);

^o See Gilb. Ten. 28, 29; Lit. s. 398; Co. Lit. 243, b. 373, b; *Smale v. Dale*, Hob. 120; Robins. Gavelk. 113.

^u Brooke, Coparcen. 1; Finche's L. 118-119; Co. Lit. 253, b.

^u See Gilbert's Ten. 28, 158; Lit. sec. 369; Co. Lit. 242, a, b; Plowd. 306, a.

^x See Jenk. Cent. 242, pl. 25; Ibid. 42, pl. 79; Plowd. 306.

(1) Thus an husband may desire any person who lives near where the lands lie, to enter in the name of himself and wife; and the entry of such person will, it seems, be sufficient to entitle the husband to his curtesy. Perkins, s. 464, 470; and see Prest. on Estates, 485. So if a person enter, without any previous authority, in the name of him who should enter for condition broken, it will vest the estate in him to whom it was limited on the breach of such condition, so as to maintain an ejectment, if it be assented to before the day of the demise laid in the declaration. See also *Fitchett v. Adams*, 2 Strange, 1128-9; and *Curties v. Wolverston*, Cro. Jac. 56. So a stranger may enter, and it shall avoid a fine, though levied with proclamations, if the entry be by precedent command, or be afterwards assented to; but not otherwise. 1 Cruise, 307. So if a person enter for a forfeiture in the name of him in reversion, though without express authority. See 2 Strange, 1128-9; and Co. Lit. 245, a. So, generally, if a person enter in the name of him who has right, even

so it seems that even the entry of a person properly deputed will be sufficient to give an actual seisin, and make a *possessio fratris* in him by whom he is so deputed². But we may observe, that *possessio fratris* is not much favoured¹ (1); and a stricter seisin is requisite to make such *possessio fratris* than even to maintain a writ of right² (2).

If an elder brother suffer a recovery, and die, and no execution be served, it will not make a *possessio fratris* in him to cause the sister to inherit, to the exclusion of the half-blood; for till execution served, the recovery does not operate².

If the hereditaments claimed be incorporeal, it is requisite, in order to give seisin of them to the heir, so as to make him the stock of descent, that he actually receive the rent, present to the advowson, &c.^b (3), unless such

² See Lit. s. 432; Co. Lit. 257, b. 258, a; *Comber's case*, 9 Co. 75; Gilb. Ten. 37; Plowd. 93; 1 Cru. 307. *Moody*, 1 Ves. 177; *Cowper v. Cowper*, 2 P. Wms. 735-6.

² See Co. Lit. 281, a.

¹ *Per* Gould and Blackstone, Justices, 3 Wils. 520. See *De Grey v. Richardson*, 3 Atk. 471; *Cunningham v.*

^a See Watk. Desc. 18, n (p) [607].

^b See Co. Lit. 15, b; *Kitch.* 109.

even though it be without a precedent command or subsequent assent, and whether he who has right be an infant or of full age, it shall vest the freehold in him who has such right. Perk. s. 48; Co. Lit. 245, a. 251, a.

(1) And note, it is always intended or presumed that a person claiming is of the whole-blood, till the contrary be shown. Kitch. 225, a; and Plowd. 77, a.

(2) Mr. Robinson, however, conceives that, in all cases, where the heir exercises any act of dominion over the inheritance, (as by repairing houses, fences, &c. or by receiving rents) it will amount to an actual entry. Law of Inheritances in Fee-simple, &c. 33, note (i), ch. 4, cites 1 Leon. 265, and Co. Lit. 15.

(3) And it was said by the Master of the Rolls (Sir Joseph Jekyl, in the case of *Penville v. Luscomb*, (Mosley's

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advowson, &c. be appendant or appurtenant to a manor, &c. of which he has already obtained an actual seisin. For though a seisin in law in incorporeal hereditaments will, in some cases, entitle an husband to his curtesy, yet it will not be sufficient to turn the descent, but an actual seisin must be acquired.

But if an advowson be appendant or appurtenant to a manor, then actual seisin of the manor will (as before hinted) give actual seisin also of such advowson as its appendancy^c. But if a person be disseised of a manor to which an advowson is appendant, he may, notwithstanding, present to the advowson before he regain the seisin of the manor^d. And as seisin of the principal is seisin of the accessory, so the recovery of or remitter to the principal is the recovery of or remitter to the accessory also, but not *è converso*^e. And therefore if another, during such disseisin, usurp such presentation, yet, on his remitter to the manor, such usurpation is purged, and he shall be admitted to the advowson also^f. But though recovery of the principal will restore him to the seisin of the accessory, yet the exercising any act over the accessory will not give him seisin

^c See Co. Lit. 15, b, note 1011-12; *Player v. Crouch* (1). 29, a, note (4). 49, a. *et al.* Moore, 90, pl. 223.

333, b. 349, b. 363, b; Gilb. ^d See Co. Lit. 122, b. 307, a. 333 b.

Ten. 18; *Chanc. Camb. v. Walgrave*, Hobart, 126-7; ^e See Co. Lit. 151, b. 152, a, n. (3); and *Ibid.* 15, a, n. (5.)

1 *Strange*, 54; *Rex v. Episc. Landaff*, 2 *Strange*, 1 ^f See *Rex v. Bp. of Chester*, 1 Lord Raym. 302.

Rep. temp. King, 72) that, in order to make a *possessio fratris* of an equity of redemption on a mortgage in fee, the elder brother should have brought his bill against the mortgagee, or the mortgagee should have paid him the rents and profits. And therefore, where the father made a mortgage in fee, and died after forfeiture, leaving a son and a daughter by one wife, and a son by another, and the eldest son died without bringing his bill, his Honor decreed the equity of redemption to the younger brother.

of the principal ; and, consequently, if A. be disseised of a manor to which an advowson is appendant, and dies before recovery, leaving a son and a daughter by one *ventre*, and a son by another, the eldest son² present to the advowson, but before he recover the manor die, after whose death the younger son enter into the manor as the now heir of his father, he shall be entitled also to the advowson, (subject to his brother's clerk ; and the presentation of his elder brother shall not sever such advowson from the manor, so as to render it an advowson in gross ; nor, consequently, make a *possessio fratris* to cause the sister to inherit ; but the younger son, on recovering the manor, shall recover also such advowson as its accessory³ (1).

If the hereditaments descending be in reversion or remainder expectant upon an estate of freehold, the heir may obtain what will be equivalent to an actual seisin of them, so as to turn the descent, and cause a *possessio fratris*, by granting them over for life or in tail. But of this more will be said in a future chapter.

But although a person have obtained an actual seisin of lands, &c. he may again be ousted of the freehold by the wrongful act of another individual¹, and this is termed A DISSEISIN. By such disseisin, the actual possession is in the disseisor, and the disseisee has but a right. But such right would regularly descend to his heir at law in the same manner as if clothed with the possession : but, if the disseisee had died, and the right descended to his heir,

How an actual seisin may be defeated.

² See Co. Lit. 333, b.

¹ See *Taylor d. Atkins v.*

³ See Ibid. 29, a, n. (4). *Horde et al.* 1 Burr. 107 ; 306, b. 307, a. 349, b. 363 ; Cowp. 701 ; S. C. Co. Lit. and see Ibid. 151, 152 ; 181, a ; 3 Blac. Com. 169. 3 Wils. 526, 527.

(1) As to the methods of gaining seisin of rents and services, see *Belvil's case*, 4 Co. 8, 9 ; Co. Lit. 68, a. 153 a. 315 a ; Lit. sec. 235 ; Jenk. Cent. 284, pl. 14 ; *Brediman v. Bromley*, Cro. Jac. 142, pl. 20.

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and such heir had died also, leaving a brother of the half and a sister of the whole blood, and without having ever recovered the possession of the premises, the brother of the half-blood would succeed to the inheritance, and not the sister of the whole; for such heir having had only a right, and no actual possession or seisin, he could not have turned the descent: so that, on his death, the person should succeed who could make himself heir, not to such heir of the disseisee, but to the disseisee himself, he being the person who was last actually seised. For, though the disseisin deprived him of the actual possession or seisin, yet it only related to the time of such disseisin made, and would not have relation to any prior event; so that, as he was once actually seised, that actual seisin shall not be *ab initio* defeated, but the pedigree shall run, and the claim be made from him, as being so seised^k.

But the actual seisin or possession of him who has succeeded to an inheritance may nevertheless, in certain events, be absolutely and *ab initio* destroyed, so as to have relation to the estate of a precedent possessor, and utterly defeat the seisin or possession of the person so seised; and this is by the endowment of the widow of such precedent possessor. For by the endowment of such widow, (for instance, the mother of the heir,) she is in from her husband, and not from the heir; and her estate is, as it were, the continuance of that of her husband. So that during her possession (1) of the third part of such lands as her dower, the heir can have no actual seisin of such third so as to make a *possessio fratris*. So that if the elder brother enters, and then endows his mother, and dies, the brother of the half-blood shall have the third so given in

^k Watk. Desc. [65].

(1) The freehold is not in the widow till she enter into the lands assigned, or the seisin be actually delivered by the sheriff. See Co. Lit. 32, b. 37, a, n. (1); Hale's MSS.; Lit. s. 393.

dower¹. So, where there are grandfather, father and son, **DESCENTS.** and the grandfather dies; the father dies, (either before or after entry,) and the son enters and endows his grandmother, his and his father's seisin is destroyed (and if there had been twenty descents, alienations or disseisins, they would all be defeated), and the son has only a reversion on an estate of freehold, as has been said; for by the endowment of the grandmother, every mesne estate was defeated (1).

But we must be careful to recollect, that it is the possession of the widow of such third, *as her dower* (2), that thus defeats the seisin of the heir, because she being then in, as from her husband, her estate is, as it were, the continuance of his; but if she possesses it in any other manner than as her dower, the seisin of the heir will not be thereby destroyed; as if, after the death of her husband (3), and

¹ Co. Lit. 15, a. 31, a. 240, a. 241, a; Lit. s. 39.

(1) Yet this shall not defeat the estate of a bastard *igne*; and therefore, if the bastard die seised, and his issue endow the widow of the bastard, or the widow of the bastard's father, yet the estate in dower shall not have relation so as to defeat the estate of the issue as to such third; for the dying seised of the bastard, and the descent to his issue, established his title to the whole; and, being once fixed in the issue, the law will not permit it to be afterwards defeated, or the legitimacy of the bastard called in question after his decease. 8 Co. 101, b; Co. Lit. 244, a; and see *Pride v. E. of Bath and Montague*, 1 Salk. 120; Gilb. Ten. 29, &c.; and Watk. n. xxvi.

(2) And note, that if the heir assigns dower of lands of which the husband was seised, but of which the wife was not dowable, yet she is tenant in dower of the lands assigned. Finch, L. b. 1, c. 3, p. 36; Co. Lit. 34, b, note (9); Hale's MSS. So, if the widow be endowed, and afterwards exchanges with the heir for other lands, yet she is tenant in dower of the lands so taken in exchange, and shall be in of them by her husband. Hale's MSS. as above.

(3) For, if she accepts such lease during the life of the husband, it will be no bar of her dower; as, while he is living,

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before endowment, she accepts a lease for life or years of the heir^m: for, in such case, she is in of her own estate, which can have no relation to that of her husband, so as to coalesce with, and constitute a continuance of his estate. And as the heir had gained an actual seisin of the whole, these estates (for life or years) are portions of his interest, and not derived from an interest which was anterior or paramount to his own; so that his seisin will not be thereby defeated, but the person claiming on his death must make himself heir to him, as of the person last seisedⁿ.

Thus, by the endowment of the widow of a precedent possessor, when the heir takes the hereditaments by descent, will the seisin of such heir be defeated: curtesy will not admit of any mesne seisin at all^o, otherwise the consequences of it, as to this point, would have been the same, it being equally an estate of freehold, and taking effect, in reality, as dower does by relation, before any interest be vested in the heir^p. The law does not cast the possession of the estate in dower (*i. e.* of dower at common law, for with respect to free-bench of copyholds it is otherwise^q) on the widow^r (1); nor can she enter without

^m Perkins, Dower, s. 350; Inst. 154; Gilb. Ten. 173; F. N. B. 149, (E); Kitch. 2 Blac. Com. 127; Watk. Desc. [81.]

ⁿ See further on this subject, Watk. Desc. 89.

^p Ibid.

^q See *Paine's case*, 8 Co. Hob. 181; *Vaughan d. Atkins v. Atkins*, 5 Burr: 2787. Lit. 29, b. 30, a. 241, b; 2

^r See Gilb. Ten. 26.

living, she can have only a title to dower, and not an immediate right. Beside, she being under coverture, her acceptance is not conclusive, but waivable after his death. See Jenk. 15, 16, pl. 27; Watk. Desc. [69].

(1) But it should seem, that if the custom be that the widow shall have a portion only, as the half or third, (see Co. Lit. 33, b; Kitch. 105) and not the whole of a copyhold,

assignment by the sheriff, or the agreement of the heir¹ (b); **DESCENTS.**
 so that, in this case, the heir may first enter and acquire
 seisin; but the law vest the estates, by curtesy, in the hus-
 band, without any assignment, and even without entry, if
 the wife were already in possession², but not otherwise,
 immediately on issue had; by which circumstance he be-
 comes tenant *initiate*, though his estate is not consummate
 till the death of the wife³; so that there being no chasm
 or intermission from the death of the wife to the posses-
 sion of the husband, as there is, in the case of dower, be-
 tween the death of the husband and the possession of the
 widow, no *mesne seisin* can here take place. Beside, the
 tenant by the curtesy holds immediately of the lord, and is
 tenant to him⁴; whereas the dowager holds of the heir⁵,
 and is attendant on such heir for the third of the services⁶.

But though the seisin of the heir may be defeated, as
 we have observed, yet where the seisin of an inheritance

¹ See Lit. s. 43; Co. Lit. 32, b. 34, b. 37, a, b; Plowd. 529; 2 Blac. Com. 135.

² See 2 Blac. Com. 127; 2 Inst. 154.

³ See Doct. & Stud. b, 2; c. 4; and 2 Inst. 154; Co. Lit. 30, a. 40, a, b, n. (2); 2 Blac. Com. 128; Plowd. 264.

⁴ 2 Inst. 301; 2 Com. 126; Paine's case, 8 Co. 36, a.

⁵ Co. Lit. 31, b. 241, a, n. (1); 2 Blac. Com. 135, 136.

⁶ See Ibid.; and Perk. s. 424; 7 Co. 9, a; 8 Ibid. 36, a; 9 Ibid. 135, a, b.

copyhold, as her dower or free-bench, the possession is not
 cast upon her any more than at common law, and an as-
 signment, in such case, would be equally necessary.
 Ibid. So of gavelkind lands, of which the widow shall
 have a moiety, she must demand her dower of the heir,
 and shall have it assigned by metes and bounds. See
 Robins. Gavelk. b. 2, c. 2, p. 175, &c.; and see 2 Wath.
 on Copyh. 89, 90.

(1) But, it should seem, that even in these cases the
 freehold is not in the widow till actual entry. See note
 (1) to Co. Lit. 37, a; Hale's MSS; and see Dyer, 278, a,
 pl. 4.

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Descent to issue
of person last
seised.

is once alleged, it shall always be intended to continue till the contrary be shown^a.

When a person dies so seised, as is before noticed, the inheritance first goes to his issue: as, if there be Geoffrey, John and Matthew, grandfather, father and son, and John purchases lands, and dies, his son Matthew shall succeed him as heir, and not the grandfather Geoffrey, to whom the land shall never ascend, but shall rather escheat to the lord^b. This rule, so far as it is affirmative, and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide: but the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original: for, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother^c. And by the laws of Rome, in the first place the children or lineal descendants were preferred; and, on failure of these, the father and mother, or lineal ascendants succeeded, together with the brethren and sisters^d; though by the law of the twelve tables, the mother was originally, on account of her sex, excluded^e. Hence this rule of our laws has been censured and exclaimed against as absurd, and derogating from the maxims of equity and natural justice^f. Yet, that

^a *Cockman v. Farrer*, Sir T. Jones, 182; and see Plowd. 193, a. 431, a; and Watk. Desc. [84].

^d Ff. 38, 15; 1 Nov. 118, 127.

^e Inst. 3, 3, 1.

^f Craig. De Jur. Feud. l. 2, t. 13, s. 15; Locke on Gov.

^b Lit. s. 3.

^c Selden, de Succ. Ebr. part 1, s. 90. c. 12.

there is nothing unjust or absurd in it, but that, on the contrary, it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws^s.

We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor, after which, the land, by the law of nature, would again become common, and liable to be seized by the next occupant. But society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills and successions, whereby the property originally gained by possession is continued, and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly, therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law. If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures; for it was an express rule of the feudal law^b, that *successionis feudi talis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtains also in the French law to this day^c. Our Henry the First, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line^k; but this soon fell again into disuse; for, so early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law^l, that *hereditas nunquam*

^s 2 Blac. Com. 210.

Montesq. Esp. L. l. 13, c. 33.

^b 2 Feud. 50.

^k LL. Hen. I. c. 70

^l Domat. p. 2, l. 2, t. 2;

^l Lib. 7, c. 1.

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ascendit; which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feudal original; and, taken in that light, there are some arguments in its favour, besides those which are drawn merely from the reason of the thing. For, if the feud, of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then, for other reasons, (which will appear hereafter), the father could in nowise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feudal constitutions^m, which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also, upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed of a feud descended from his ancestors, such feud must, in all respects, have descended as if it had been really an ancient feud, and therefore could not go to the father, because, if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum* or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, though they do not, in every instance, apply in the application of them, (as the same reasons would prevent an

^m 1 Feud. 20.

elder brother from taking by descent from the younger) (1), yet they seem to be more satisfactory than that quaint one of Bracton^a, adopted by Sir Edward Coke^b, which regulates the descent of lands according to the laws of gravitation.

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II. A second general rule or canon is, that the male issue shall be admitted before the female.

Male issue preferred to female.

Thus, sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred^c. As, if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies, first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters. This preference of males to females is entirely agreeable to the law of succession among the Jews^d, and also among the states of Greece, or at least among the Athenians^e, but was totally unknown to the laws of Rome^f, (such of them, I mean, as are at present extant), wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex, but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law; for though our British ancestors, the Welsh, appear to have given a preference to males^g, yet our Danish predecessors (who suc-

^a Descendit itaque jus, quasi ponderosum quid cadens deorsum recta linea, et nunquam reascendit. l. 2, c. 29.

^b Hal. H. C. L. 235.

^c Numb. c. 27.

^d Petit. LL. Attic. l. 6,

t. 6.

^e Inst. 3, 1, 6.

^f Stat. Wall. 12 Edw. 1.

^g 1 Inst. 11.

(1) See *Eastwood v. Viner*, 2 P. Wms. 613, where a father inherited immediately from his son, as his collateral kinsman; and see *Prest. Tracts*, 78.

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ceeded them) seem to have made no distinction of sex, but to have admitted all the children at once to the inheritance¹. But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. “*Pater aut mater, defuncti, filio non filia hæreditatem relinquent. . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat*”². It is possible, therefore, that this preference might be a branch of that imperfect system of feuds which obtained here before the conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry the First, it is not (like many Norman innovations) given up, but rather enforced³. The true reason of preferring the males must be deduced from feudal principles; for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud⁴, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations; our law, like that of the Saxon feudists before mentioned, thus steering a middle course between the absolute rejection of females, and the putting them on a footing with males.

Primogeniture
among males,
but none among
females.

III. A third rule or canon of descent is this; that where there are two or more males of equal degree, the eldest only shall inherit, but the females altogether. As, if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but

¹ LL. Canut. c. 68.

² Tit. 7, s. 1, 4.

³ c. 70.

⁴ 1 Feud. 8.

if both the sons die without issue, before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners^a. This right of primogeniture in males, seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance^b; in the same manner as with us, by the laws of king Henry the First^c, the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary^d. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way, and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible^e, or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was further enforced by the inconveniences that attended the splitting of estates, namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments^f. These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in

^a Lit. s. 5; Hale, H. C. L. 238.

^b Selden, de Succ. Ebr. c. 5.

^c c. 70.

^d Glanvill, l. 7, c. 3.

^e 2 Feud. 35.

^f Hale, H. C. L. 221.

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all military tenures ; and in this condition the feudal constitution was established in England by William the Conqueror. Yet we find, that soccage estates frequently descended to all the sons equally, so lately as when Glanvil^a wrote, in the reign of Henry the Second ; and it is mentioned in the Mirror^b, as part of our ancient constitution, that knights fees should descend to the eldest son, and soccage fees should be partible among the male children. However, in Henry the Third's time we find, by Bracton^c, that soccage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands ; except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons ; and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the ancient law ; for they were all equally incapable of performing any personal service, and therefore, one main reason of preferring the eldest, ceasing, such preference would have been injurious to the rest ; and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown^d, wherein the necessity of a sole and determinate succession, is as great in the one sex as in the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For, if a man holds an earldom to him and the heirs of his body, and dies, leaving only

^a l. 7, c. 3.

^b c. 1, s. 3.

^c l. 2, c. 30, 31.

^d Somner, Gavelk. 7.

^e Co. Lit. 165.

daughters, the eldest shall not, of course, be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases¹. In which disposition is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture, even among the males, was established, namely, that the lord might bestow them on which of the sons he thought proper; “*progressum est, ut ad filios deveniret, in quem scilicet dominos hoc vellet beneficium confirmare*”^m.

IV. A fourth rule or canon of descents, is this; that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living. Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*ⁿ. And these representatives shall take neither more nor less, but just so much as their principals would have done. As, if there be two sisters, Margaret and Charlotte, and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies, without other issue; these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living, that is, a moiety of the lands of John Stiles in coparcenary: so that upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one apiece. And this right of representation takes place in descents of customary estates, as gavelkind, borough English, and copyholds, as well as estates at common law^o. This taking by representation is called succession *in stirpes*, according to the roots;

Right of representation.

¹ Co. Lit. 165.

^m 1 Feud. 1.

ⁿ Hale, H. C. L. 236, 237.

^o See *Blackburn v. Graves*,

¹ Mod. 102; *Clements v. Scudamore*, 2 Lord Raym.

1094; Rob. Gav. 91.

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since all the branches inherit the same share that the root, whom they represent, would have done. And in this manner, also, was the Jewish succession directed^p, but the Roman somewhat differed from it. In the descending line, the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*; as, if one of three daughters died, leaving ten children, and then the father died, the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals: if any person of equal degree with the persons represented were still subsisting, (as, if the deceased left one brother, and two nephews the sons of another brother), the succession was still guided by the roots; but if both the brethren were dead, leaving issue, then (I apprehend) their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike, they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation^q. So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third, his inheritance, by the Roman law, was divided into six parts, and one given to each of the nieces; whereas the law of England, in this case, would still divide it only into three parts, and distribute it *per stirpes*, thus: one-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother. This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first-born among the males, to both of which the Roman law is a stranger; for, if all the children of three sisters were in England to claim *per capita*, in their own right, as next of kin of the ancestor, without any

^p Selden De Succ. Ebr. c. 1.

^q Nov. 110, c. 3; Inst. 3, 1, 6.

respect to the stocks from whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters, or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first-born among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same; and among these several issues, or representatives of the respective roots, the same preference to males, and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As, if a man hath two sons, *A.* and *B.* and *A.* dies, leaving two sons, and then the grandfather dies: now the eldest son of *A.* shall succeed to the whole of his grandfather's estate, and if *A.* had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of *B.* and his issue. But if a man hath only three daughters, *C.* *D.* and *E.* and *C.* dies, leaving two sons, *D.* leaving two daughters, and *E.* leaving a daughter and a son, who is younger than his sister; here, when the grandfather dies, the eldest son of *C.* shall succeed to one-third, in exclusion of the younger; the two daughters of *D.* to another third in partnership; and the son of *E.* to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards in *infinitum*. Yet this right does not appear to have been thoroughly established in the time of Henry the Second, when Glanvil wrote; and therefore, in the title to the crown especially, we find frequent con-

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On failure of
lineal descend-
ants, collaterals
take.

V. A fifth rule is, that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules(1).

^r Mod. Un. Hist. xlii. 334.

^s l. 7, c. 3.

^t Hale, H. C. L. 217, 229.

^u Bracton, l. 2, c. 30, s. 2.

(1) The custom of gavelkind extends to collaterals; so that if one brother die without issue, all the other brothers shall succeed. See Rob. Gavelk. 92, 98; and see *Hale's case*,

Thus, if Geoffrey Stiles purchases lands, and it descends to John Stiles his son, and John dies seised thereof, without issue, whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family². The first *purchaser*, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent. This is a rule almost peculiar to our own laws, and those of a similar original; for it was entirely unknown among the Jews, Greeks and Romans, none of whose laws looked any further than the person himself who died seised of the estate, but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy³ agrees with our law in this respect; nor indeed is that agreement to be wondered at, since the law of descents in both is of feudal original; and this rule or canon cannot otherwise be accounted for, than by recurring to feudal principles. When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of (that is, lineally descended from) the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother; because he was not descended nor derived his blood from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother or such other collateral relation as was descended and derived his blood from the first feudatory, might suc-

² Co. Lit. 12.³ Gr. Coustom. c. 25.

case, cited 1 P. Wms. 65. But not the custom of borough English; lands of that tenure, therefore, shall not go to the youngest brother without a special custom. Ibid. 38, 93; Wright's Ten. 212, n.; *Denn d. Goodwin v. Spray*, 1 Durnf. & East, 466.

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ceed to such inheritance. To this purpose speaks the following rule: "*Frater fratri, sine legitimo hærede defuncto, in beneficio quod eorum patris fuit succedat: sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitime hærede, frater ejus in feudum non succedit*".

The true feudal reason for which rule was this; that what was given to a man, for his personal service and merit, ought not to descend to any but the heirs of his person. And, therefore, as in estates-tail, (which a proper feud very much resembled) so in the feudal donation, "*nomen hæredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vassali extenditur; et non ad collaterales, nisi ex corpore primi vassali sive stipitis descendant*"; the will of the donor, or original lord (when feuds were turned from life estates into inheritances), not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*; not hereditary to the collateral relations, or lineal ancestors, or husband or wife of the feudatory, but to the issue descended from his body only. However, in process of time, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed, even *in infinitum*, because they might have been of the blood of (that is, descended from) the first imaginary purchaser. For, since it is not ascertained in such general grants whether this feud shall be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely, as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended, the law will not ascertain it, but will suppose *any* of his ancestors, *pro de rata*, to have been the first purchaser;

* 1 Feud. 1, s. 2.

* Crag. l. 1, t. 9, s. 36.

and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors. Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum* to be held *ut novum*; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple is with us a *feudum novum*, to be held *ut antiquum*, as a feud whose antiquity is indefinite; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance. Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed, and none are admitted but the heirs of those through whom the inheritance hath passed; for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles, by descent from his mother, Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and *vice versâ*, if they descended from his father, Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descending from his father's father, George Stiles, the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father (1). This is also the rule of the ancient

(1) See further as to descents *ex parte materna*, and what acts will change the descent to the paternal line, Watk. Desc. ch. 5.

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French law^b, which is derived from the same feudal fountain. Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no further, as, if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christian Smith, or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases, the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate; because, in the first case, it is really uncertain; and, in the second case, it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother. This, then, is the great and general principle upon which the law of collateral inheritances depends—that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has or is supposed, by the fiction of law, to have originally descended; according to the rule laid down in the Year books^c, Fitzherbert^d, Brook^e, and Hale^f, “that he who would have been heir to the father of the deceased,” (and of course, to the mother, or any other real or supposed purchasing ancestor), “shall also be heir to the son;” a maxim that will hold universally, except in the case of brother or sister of the half-blood, which exception (as we shall see hereafter) depends upon very special grounds.

And no limitation of an estate taken by purchase can alter this course of descent. If, therefore, it be expressly limited to a man and his “heirs of the part of the mother,”

^b Domat. part. 2, pr.

^e Ibid. 38.

^c M. 12 Edw. 4, 14.

^f H. C. L. 243.

^d Abr. tit. Descent, 2.

yet his heirs, on the part of his father, shall succeed; for it is not in the power of any individual to institute any new kind of inheritance not known to the common law¹.

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The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which, in *feudis vere antiquis*, has, in process of time, been forgotten, and is supposed so to be in feuds that are held *ut antiquis*.

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman of the whole-blood. First, he must be his next collateral kinsman either personally or *jure representationis*, of that line of ancestors from whom the estate came⁽¹⁾, which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed; it therefore accounts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great nephew, but also his first cousin, to be both related to him in the fourth degree, because there are three persons between him and each of them.

Collateral heir
must be colla-
teral kinsman

¹ See Co. Lit. 13, a. 27, a; Watk. 223, n. (1); Rob. Gav. 52.

(1) But if both the paternal and maternal lines are admitted to the inheritance, the nearest of kin in the line of the father will be preferred (by Rule *xiii. post*) to those of the line of the mother, even though they should be nearer of kin to the *propositus* than those of the line of the father.

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The canon law regards consanguinity principally with a view to prevent incestuous marriages between those who have a large proportion of the same blood running in their respective veins, and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him; so that the great nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second; the former being distant three degrees from the common ancestor, (the father of the *propositus*,) and therefore deriving only one-fourth of his blood from the same fountain; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each,) and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and, having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. Indeed, the designation of person, in seeking for the next of kin, will come to exactly the same end (though the degrees will be differently numbered) whichever method of computation we suppose the law of England to use, since the right of representation of the parent by the issue is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants, therefore, of John Stiles's brother, are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his

great-uncle in the third, as their respective ancestors, if living, would have been, and are severally called to the succession in right of such their representative proximity. The right of representation being thus established, the former part of the present rule amounts to this, that on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives, he being lineally descended from Geoffrey Stiles, John's next immediate ancestor or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance among the ancient Germans, our progenitors: *heredes successorisque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi*^a". Now here, it must be observed, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks, from which the next successor must spring. And therefore, in the Jewish law, (which in this respect entirely corresponds with ours¹;) the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue, who are held to succeed, not in their own rights, as brethren, uncles, &c. but in right of representation, as the offspring of the father, grandfather, &c. of the deceased^b. But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him in making out the pedigree or descent; for the descent between two brothers is held to be an immediate descent; and therefore title may be made by one brother, or his repre-

^a Tacitus de Mor. Germ.^b Selden. de Succ. Ebr.

21.

c. 12.

^c Numb. c. 27.

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sentative, *to or through* another, without mentioning their common father¹. If Geoffrey Stiles hath two sons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey; and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather, viz. as the son of Francis, who was the brother of John, who was the father of Matthew. But, though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree, and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third and fourth, and so upwards *in infinitum*, till some couple of ancestors be found who have other issue descending from them besides the deceased in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation, the same rules must be observed with regard to sex, primogeniture, and representation that have before been laid down with regard to lineal descents from the person of the last proprietor. But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for if there be a much nearer kinsman of the half-blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded: nay, the estate shall escheat to the lord, sooner than the half-blood shall inherit. A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestor, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees

¹ 1 Sid. 196; 1 Vent. 423; 1 Lev. 60; 12 Mod. 619.

will permit) all the same ingredients in the composition of his blood that the other hath. Thus the blood of John Stiles being composed of those of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him, the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half-blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A. and B. by different ventres or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A. who enters thereon, and dies seised without issue; still B. shall not be heir to this estate, because he is only of the half-blood to A. the person last seised: but it shall descend to a sister, if any, of the whole blood to A.: for in such cases the maxim is, that the seisin, or *possession*, *facit heredes esse*. Yet, had A. died without entry, then B. might have inherited, not as heir to A. his half-brother, but as heir to their common father, who was the person last actually seised^m. This total exclusion of the half-blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an

^m Hale, H. C. L. 238.

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auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when, by length of time and a long course of descents it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible, then the law substituted what Sir Martin Wright^a calls a reasonable, in the stead of an impossible proof; for it remits the proof of an actual descent from the first purchaser, and only requires in lieu of it that the claimant be next of the whole-blood to the person last in possession (or derived from the same couple of ancestors), which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. For he who is my kinsman of the whole-blood, can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versa* his; he, therefore, is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half-blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser; which makes it more probable that the son by the first wife should be derived from the first purchaser, than that the son by the second wife should. To illustrate this by example, let there be John Stiles and Francis, brothers by the same father and mother, and another son of the same mother by

^a Tenures, 186.

Lewis Gay a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole-blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay, or brother of the half-blood, is utterly incapable of being heir; for he cannot prove his descent from the first purchaser, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely not to be descended from the line of the first purchaser, as to be descended; and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole-blood. And, as this is the case in *feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten, it is also the case in *feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in the fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they be of the whole-blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor, but those of the half-blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchaser, though only of the half-blood, must thus be disinherited, and a more remote relation of the whole-blood admitted, merely upon a supposition and fiction of law, since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half-blood) are entitled to inherit at all; for we have seen, that in *feudis stricte novis* neither brethren nor any other collaterals were admitted. As, therefore, in *feudis antiquis* we have

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seen the reasonableness of excluding the half-blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent. Perhaps by this time the exclusion of the half-blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtle nicety, but, considering the principles upon which our law is founded, it is not an injustice, nor always a hardship, since even the succession of the whole-blood was originally a beneficial indulgence, rather than the strict right of collaterals, and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole-blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim), there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John Stiles above the common stock, are also the ancestors of his collateral kinsman of the whole-blood, yet unless that common stock be in the first degree, (that is, unless they have the same father or mother) there will be intermediate ancestors below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole-blood, can each have no other ancestors, than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother), one-half of John's ancestors will not be the ancestors of his uncle; his *patruus*, or father's brother, derives not his descent from John's maternal ancestors, nor

his *avunculus*, or mother's brother, from those in the paternal line. Here, then, the supply of proof is deficient, and by no means amounts to a certainty, and, the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half-blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole-blood in the same degree. As, in the first degree, the whole-brother of John Stiles is sure to be descended from that unknown ancestor; his half-brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole-blood has an even chance, but the chances are three to one against his uncle of the half-blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great-uncle of the whole-blood, but they are seven to one against his great-uncle of the half-blood, for seven-eighths of John's ancestors have no connexion in blood with him. Therefore, the much less probability of the half-blood's descent from the first purchaser, compared with that of the whole-blood, in the several degrees, has occasioned a general exclusion of the half-blood in all. But in illustrating the reason of excluding the half-blood in general, we must be impartial enough to own, that, in some instances, the practice is carried further than the principle upon which it goes will warrant; particularly, when a kinsman of the whole-blood in a remoter degree, as the uncle or great-uncle, is preferred to one of the half-blood in a nearer degree, as the brother, for the half-brother hath the same chance of being descended from the purchasing ancestor, as the uncle; and a two-fold better chance than the great uncle or kinsman in the third degree. It is also more especially overstrained, when a man has two sons by different ventres, and the estate on his death descends from him to the eldest, who enters, and dies without issue; in

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Indeed it is this very instance of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre*, that Craig^o has singled

• l. 2, t. 15, s. 14.

(1) A still harder case than this happened M. 10 Edw. 3. On the death of a man, who had three daughters by a first wife, and a fourth by another, his lands descended equally to all four as coparceners. Afterwards the two eldest died without issue; and it was held, that the third daughter alone should inherit their shares, as being their heir of the whole-blood; and that the youngest daughter should retain only her original fourth part of their common father's lands, (10 Ass. 27). And yet it was clear law in M. 19 Edw. 2, that, where lands had descended to two sisters of the half-blood, as coparceners, each might be heir of those lands to the other. Mayn, Edw. 2, 628; Fitz. Abr. *et curare immedit.* 177.

out, on which to ground his strictures on the English law of half-blood. And, really, it should seem as if originally the custom of excluding the half-blood in Normandy^p extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versâ*; and possibly in England also, as even with us it remained a doubt, in the time of Bracton^q, and of Fleta^r, whether the half-blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly-purchased lands. So also the rule of law, as laid down by Fortescue^s, extends no further than this: *frater fratri uterino non succedet in hæreditate paterna*. It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half-blood of the preceding sovereign^t, so that it be the blood of the first monarch, purchaser, or (in the feudal language), conqueror, of the reigning family. Thus it actually did descend from king Edward the Sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half-blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by act of parliament^u) the princess Sophia of Hanover. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half-blood is no impediment to the descent^x; because, when the lineage is clearly made out, there is no need of this auxiliary proof.

The rule, then, together with its illustration, amounts to this: that, in order to keep the estate of John Stiles as

^p Gr. Coustum. c. 25.

^t Plowd. 245; Co.Lit. 15.

^q l. 2, c. 30, s. 3.

^r 12 Will. 3, c. 2.

^s l. 6, c. 1, s. 14.

^x Lit. s. 14, 15.

^u De Laud. LL. Angl. 5.

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It may also be remarked, that if the half-blood were universally admitted to inherit, an estate might pass out of one family into another, between which there might be no union of blood. As, suppose a son to inherit an estate from his father, and his mother to marry again, and have a son by her second husband; if this son were permitted to inherit from his half-brother, he would thus acquire the estate of the first husband, to whom he was in no ways related by blood. But, after all, it must be admitted to be wholly contrary to our notions of justice, or at least of consistency and propriety, that a distant relation, or even the lord by escheat, should take an estate in preference to an half-brother, in cases where it has descended from the common parent, or where the half-brother has himself acquired it^r.

How far, therefore, it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half-blood might always inherit where the estate notoriously descended from its own proper ancestor, and, in cases of new-purchased lands or uncertain descents, should never be excluded by the whole-blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long established rule should be shaken, is a matter which requires mature deliberation to determine.

But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing, according to the dis-

^r See a case of great hardship of this sort, 3 Wils. 516.

tances, in a geometrical progression upwards², the descendants of all which respective couples are (representatively) related to him in the same degree. Thus, in the second degree, the issue of George and Cecilia Stiles, and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which, therefore, of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor might be sought for, another qualification is requisite, besides proximity and entirety, which is that of dignity or worthiness of blood. For,

VII. The seventh and last rule or canon is, that, in collateral inheritances, the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have, in fact, descended from a female. Thus, the relations on the father's side, are admitted *in infinitum*, before those on the mother's side are admitted at all^a; and the relations of the father's father, before those of the father's mother, and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden^b and Petit^c; though among the Greeks, in the time of Hesiod^d, when a man died without wife or chil-

Male stock preferred to females in collateral inheritances.

² See page 204.

^c L.L. Attic. l. 1, t. 6.

^a Lit. s. 4.

^d *Θίος*. 606.

^b De Succ. Ebraor. c. 12.

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dren, all his kindred (without any distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws, in which the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian^e abolished all distinction between them. It is also conformable to the customary law of Normandy^f, which indeed, in most respects, agrees with our English law of inheritance. This rule of our law might not, however, owe its immediate original to any view of conformity to those which have been just now mentioned, but was probably established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down, that every heir must be of the blood of the first purchaser. For, when such first purchaser was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to discover him by taking the next relation of the whole-blood to the person last in possession, but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent, from the first purchaser to the present time, they judged it more likely that the lands should have descended to the last tenant from the male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than from the father's mother; and therefore they hunted back the inheritance (if the expression may be allowed) through the male line, and gave it to the next relations on the side of the father, the father's father, and so upwards: imagining, with reason, that this was the most probable way of continuing in the line of the first purchaser: a conduct much more rational than the preference of the *agnati* by the Roman laws; which, as they gave no advantage to the males in the first instance, or direct lineal succession, had no reason for pre-

^e Nov. 118.

^f Gr. Coustum. c. 25.

ferring them in the transversè collateral one; upon which account, this preference was very wisely abolished by Justinian. That this was the true foundation of the preference of the *agnati*, or male stocks, in our law, will further appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by his father's side, as such, can ever be admitted to them, because he cannot possibly be of the blood of the first purchaser. And so, *è converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother, Cecilia Kempe; here, not only the blood of Lucy Baker, his mother, but also of George Stiles, his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland, the mother of Cecilia Kempe, the line not only of Lucy Baker and of George Stiles, but also of Luke Kempe, the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known, as in the case of an estate newly purchased, to be holden *ut feudum antiquum*) here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side, leaving no place untried in order to find heirs that may by possibility be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors; but upon failure of issue there, they may possibly be found among those derived from the females. This was probably the reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that if males had been perpetually admitted, in utter exclusion of females, the

DESCENTS. tracing the inheritance back through the male line of ancestors, must at last have inevitably brought us up to the first purchaser; but, as males have not been perpetually admitted, but only generally preferred; as females have not been utterly excluded, but only generally postponed to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser; which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person; as John Stiles, who died seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity².

In the first place succeeds the eldest son, Matthew Stiles, or his issue (No. 1.)—if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue (No. 2.)—in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue (No. 3.)—On failure of the descendants of John Stiles himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in, viz. first Francis Stiles, the eldest brother of the whole-blood, or his issue (No. 4.)—then Oliver Stiles, and the other whole-brothers, respectively in order of birth, or their issue (No. 5.)—then the sisters of the whole-blood all together, Bridget and Alice Stiles, or their issue (No. 6.)—In defect of these, the issue of George and Cecilia Stiles, his father's parents, respect being still had to their age and sex (No. 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather (No. 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's

² See the Table of Descents annexed, (III).

father (No. 9.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother (No. 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*, till both the immediate bloods of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of Luke and Frances Kempe, the parents of John Stiles's paternal grandmother (No. 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father (No. 12.)—and so on in his paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*.—In default of which, we must call in the issue of Charles and Mary Holland, the parents of the paternal grandmother's mother (No. 13.)—and so on in the paternal grandmother's maternal line, or blood of Francis Holland, *in infinitum*, till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent.—Whereby the paternal blood of John Stiles entirely failing, recourse must then, and not before, be had to his maternal relations, or the blood of the Bakers, (No. 14, 15, 16), Willis's (No. 17.) Thorpes (No. 18, 19), and Whites (No. 20), in the same regular successive order as in the paternal line.

The student should, however, be informed, that the class No. 10, would be postponed to No. 11, in consequence of the doctrine laid down, *arguendo*, by Justice Manwoode, in the case of *Clare v. Brooke*^b, from whence it is adopted by Lord Bacon^c and Sir Matthew Hale^d; because it is said, that all the female ancestors on the part of the father are equally worthy of blood; and in that case proximity shall prevail. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured (in point of theory, for the case never yet occurred in practice) to give preference to No. 10, before

^b Plowd. 460.

^c Elem. c. 1.

^d H. C. L. 240, 244.

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No. 11, for the following reasons: 1. Because this point was not the principal question in the case of *Clere v. Brooke*; but the law concerning it is delivered *obiter* only, and in the course of argument, by Justice Manwoode, though afterwards said to be confirmed by the three other Justices in separate extra-judicial conferences with the reporter. 2. Because the Chief Justice, Sir James Dyer, in reporting the resolution of the court in what seems to be the same case¹, takes no notice of this doctrine. 3. Because it appears from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of Justice Manwoode, since the blood of No. 10 was derived to the purchaser through a greater number of males than the blood of No. 11, and was therefore, in their opinion, the more worthy of the two. 4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table, wherein No. 16, which is analogous in the maternal line to No. 10 in the paternal, is preferred to No. 18, which is analogous to No. 11, upon the authority of the eighth rule laid down by Hale himself; and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before given, besides the mere dignity of blood. Because it introduces all that uncertainty and contradiction which is pointed out by an ingenious author², and establishes a collateral doctrine (viz. the preference of No. 11 to No. 10) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of *Clere v. Brooke*, viz. the preference of No. 11 to No. 14. And though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty, it is apprehended that the difficulty may be better cleared by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because the reason that is given for this doc-

¹ Dyer, 314.

² Law of Inheritances, 2d edit. p. 33, 38, 61, 62, 66.

trine, by Lord Bacon, (viz. that in any degree paramount to the first, the law respecteth proximity, and not dignity of blood,) is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents. 7. Because this position seems to contradict the allowed doctrine of Sir Edward Coke^a, who lays it down, (under different names,) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both No. 9 and No. 10 are extinct. Wherefore No. 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. 4, 14^o, (much relied on in the case of *Clere v. Brooke*) it is laid down as a rule, that "*cestui que doit inheriter al pere, doit inheriter al fits*." And so Sir Matthew Hale^c says, "that though the law excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been had the father inherited." Now it is settled, by the resolution in *Clere v. Brooke*, that No. 10 should have inherited before No. 11 to Geoffrey Stiles the father, had he been the person last seised; and therefore No. 10 ought also to be preferred in inheriting to Johu Stiles the son (1).

In case John Stiles was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that

^a Co. Lit. 12; Hawk. Abr. 2; Bro. Abr. tit. Descent, 3. in loc. ^b See 2 Blac. Com. 223.

^c Fitzh. Abr. tit. Descent, ^d Hist. C. L. 243.

(1) And see the same doctrine adopted by Mr. Robinson, *Inher. Fee-simp.* c. 6, and ably supported by Mr. Professor Christian, in his Notes to the Commentaries of Sir William Blackstone, and also by Mr. Watkins, in his learned Essay on the Law of Descents (*Desc.* p. 170); but ingeniously controverted by an anonymous writer of "*Remarks on the Law of Descents.*"

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the blood of the line of the ancestors, from which it did not descend, can never inherit, as has been already fully explained. And the like rule, as is there exemplified, will hold upon descents from any other ancestors.

The student should also bear in mind, that, during this whole process, John Stiles is the person supposed to have been last actually seised of the estate; for, if ever it comes to vest in any other person, as heir to John Stiles, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an ancestor or *stirpes*, and must be put in the place of John Stiles. The figures, therefore, denote the order in which the several classes would succeed to John Stiles, and not to each other; and, before we search for an heir in any of the higher figures (as No. 8) we must first be assured that all the lower classes (from No. 1 to No. 7) were extinct at John Stiles's decease.

Mr. Christian, in his Notes to the Commentaries of Sir William Blackstone, has attempted to explain the above plan of descent by a more easy scheme, designed to determine the heir at law in all cases that can possibly occur, and as some have thought this more simple than the mode adopted by the learned Judge, and as the student will need every assistance that can be afforded him in this intricate branch of the law, I shall here subjoin it. In tracing the heir downwards, in the descending line, no difficulty can ever occur; but in the scheme annexed, the *propositus* is supposed to die without issue, and without brothers or sisters, seised of an estate by purchase; and *A. B. C. D. &c.* to *Z.* to be his father, grandfather, &c. his lineal ancestors of the same name, and *a. b. c. d. to z.* to be their respective wives, who are not necessarily related to each other. To find then the heir of the *propositus*, we must inquire for the lineal heir or representative of the eldest brother of *A.* the father, then for the representative of the second, third, and other brothers; but, if *A.* had no brothers, then for his

sisters and their representatives: if none can be found, we must, in like manner, have recourse to *B.* and so on to *C.*; and if we find a representative of *III.* the eldest brother of *C.* he is the heir at law to the intestate, and will inherit before the representatives of the brothers of *D. E. F. &c.* and thus we are to go back through the lineal male ancestors of the intestate; but if, in going up to *Z.* or to any indefinite distance, we can find no heir issuing from the male ancestors, we must then have recourse to the females; but, in this research, we must begin at the other end, and pursue a different direction. We must inquire, first, whether *z.* the wife of one of the remotest male ancestors of the *propositus*, had a brother or sister leaving a representative; for, if so, he will be the heir of the *propositus*, if we suppose 24—6—3. to be the respective brothers of the wives, then the descendants of 24, will inherit before those of 6, and, for the same reason, those of 6 before those of 3. If *z.* had no brother or sister leaving issue, but his collateral relations descended from her ancestors, one of those must be preferred to any heir on the part of *f. e. d. &c.*; and to discover such an heir of *z.* we must put *z.* in the place of the *propositus*, and inquire for the representatives of the brothers and sisters of her male ancestors, and then of their wives, as before; and such an heir of *z.* will inherit before the heir of *d. c. b. and a.*; and, for the same reason, their heirs, respectively, will have a preference, as we come down to *a.* This table appears not difficult to be comprehended, and will determine immediately the priority of relations ever so remote, if their pedigrees can be traced. It must be remembered, that if it is known that the estate has descended from *E.* to the *propositus*, then none of the heirs of *e. d. c. b. a.* can ever be admitted; and if it has descended from one of the wives, viz. *f. &c.* then, as before, the heirs of *e. d. c. b. a.* are excluded, and also the collaterals of the male ancestor above *E.*; and if no collateral of *E. D. &c.* (*f.*'s descendants) can be found, then to find her heir, she must be put in the place of the

DESCENTS. *propositus* in the table. The student must also observe, that if an estate, of which the *propositus* is the purchaser, should descend to a representative of a brother of *C.* from the *propositus*, upon failure of that branch, it may afterwards pass to a representative of a brother of *F.* and so upwards in the male line, but being once in the line of *VI.* the female branches *f. e. d. &c.* are cut off; for they are not related by blood to *F.* But, upon failure of that line, it is still transmissible to the lines of the females above, for the collaterals would be related by blood, or would have a common ancestor with *F.*; and this is a strong argument, in addition to those already adduced, in support of the doctrine, that the remoter females should be preferred to the nearer; for this may be presumed to have been the progress of the estate in its descent from the *propositus*; when, also, it passes from the male into the female line, it cannot afterwards pass into any other female line, for they are not related to each other by blood*.

Brothers or Sisters.	Male Line.	Their Wives.	Brothers or Sisters.
XXIV. - - - - -	Z. - - - - -	z. - - - - -	24
- - - - -	o - - - - -	o - - - - -	- - - - -
- - - - -	o - - - - -	o - - - - -	- - - - -
- - - - -	o - - - - -	o - - - - -	- - - - -
- - - - -	o - - - - -	o - - - - -	- - - - -
VI. - - - - -	F. - - - - -	f. - - - - -	6
V. - - - - -	E. - - - - -	e. - - - - -	6
IV. - - - - -	D. - - - - -	d. - - - - -	4
III. - - - - -	C. - - - - -	c. - - - - -	3
II. - - - - -	B. - - - - -	b. - - - - -	2
I. - - - - -	A. - - - - -	a. - - - - -	1

PROPOSITUS,
and first purchaser.

* See 2 Blac. Com. 240, n; also 220, n. 9.

3. *On the Descent of Remainders and Reversions expectant upon Estates of Freehold* (1).

Although, in the latter stages of the feudal law, the tenant was allowed to have an estate for life, or in fee, in the lands originally allotted to him or his ancestors, yet the ultimate property, we have seen, was considered as vested in the king, and the tenant was considered as having the *dominium utile* only, or the right of possessing and enjoying the fruits only of the land. The possession of the land was, however, in him who had such interest for life, or other greater estate; and hence livery of seisin was necessary at the creation or transfer of an estate of freehold. The freeholder had a feudal possession; and although he had granted his estate for years or at will, yet his possession, in notion of law, still continued, and the lessee was considered only as his bailiff or servant, and accountable to him for the profits of the lands at a certain stated annual sum^c. And hence, also, no other is said to be seised of property in lands but he who has a freehold estate; and, if he has a descendible estate, it will devolve on his death to his own heirs, as of the person last seised; but if the descendible estate be expectant upon a precedent freehold, the feudal seisin is in such precedent tenant; and, consequently, there can be no mesne seisin of a remainder or reversion expectant upon an estate of freehold, so as to make a *possessio fratris*, while such remainder con-

Descent of re-
versions and
remainders.

^c See Mill. View of Eng. b, note (2), and 331, a, n. Gov. b. 1, c. 5, p. 86; Gilb. (1); 2 Blackst. Com. 141, Ten. 39, 40; Co. Lit. 239, c. 9; Watk. Desc. 135.

(1) Upon this subject, Mr. Watkins, in his Essay on Descents, has furnished us with the most full and perspicuous remarks with which the profession has been favoured; to that work, therefore, the student is referred for a more particular investigation of the subject than is here attempted.

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tinues in a regular course of descent (1), viz. no seisin between the time of the death of the ancestor, and the accession of the estate in possession. But yet, as such remainder or reversion may be sold, devised or charged by the persons entitled to it^a, the descent of it may be changed by the exercise of certain acts of ownership; as by granting it over for a term of life, or in tail; because the exercise of such acts of ownership is equivalent to the actual seisin of an estate, which is capable of being reduced into possession by entry; for as an actual entry is not practicable in the case of such reversion or remainder, the alienation of them for a certain estate is sufficient to turn the descent; such grants being (before the statutes of 4 & 5 Anne, c. 16), always attended with attornment, the notoriety of them, and the consequent alteration of the tenant, were deemed equal to the actual entry on a descent, or livery of seisin on a gift or sale of an estate in possession; such attornment being originally *coram paribus*, and, in later days, sufficiently attested^b; and for this reason a reversion could not be granted over to take in future, any more than an estate in possession^c. Thus, where A. was tenant for life, with remainder to trustees for preserving contingent remainders, with remainder to the first and other sons of A. in tail, with remainder to the heirs of the body of A. with remainder to the right heirs of the father of A. (who

^a Co. Lit. 14, b, n. (4). Gilb. Ten. 81; Co. Lit. 309, a; 2 Blackst. Com. a; Touchst. 253; Sulliv. 175; *Cunningham v. Moody*, Lect. 119; 2 Blac. Com. 1 Ves. 175, 177; *Kinaston v.* 317. *Clarke*, 2 Atk. 206.

^b Plowd. 155, 483; 8 Co.

^c See Plowd. 25, 152; 74; 2 Blac. Com. 165.

(1) But if it be granted over, it vests immediately in the grantee, and makes him the stock of descent; and, in such case, the person afterwards claiming by descent, must make himself heir to such purchaser. See Hale's Com. Law, 269, c. 11.

was the deviser); and *A.* made a lease and release to *B.* in trust for the payment of his debts, &c. and levied a fine of the lands, but suffered no recovery: it was held, by Lord Hardwicke, that *A.* by such conveyance, had altered the course of the descent of the reversion, so that it should go to the heir of *A.* of the whole-blood².

And this principle, that a remainder or reversion on a freehold will admit of no mesne or intermediate seisin, while it continues in a course of descent, and no such acts of ownership as have been just mentioned have been exerted, appears to furnish a solution of the question, whether a remainder or reversion on a freehold shall be subject to the debts of the mesne remainder-man or reversioner? It is said, in *Robinson v. Tonge*³, that "as such reversionary remainder may be sold, and comes to the heir by descent, it is reasonable it should be assets." But, though a remainder or reversion on a freehold may be sold, yet as it may not come to the heir by descent from the person who contracted the debt, a distinction, it should seem, ought to be taken between extending it in the life-time of the debtor, or in the hands of his devisee, and extending it in the lives of other persons. If judgment be had in the debtor's life-time, it seems reasonable that it should bind the property, although no execution be taken out till the property descend to others; but where no judgment is had in the debtor's life-time, and the stock of descent is not changed by such mesne, it should seem that the person taking such remainder by descent, would not be subject to the debts of a mesne remainder-man or reversioner, as he would not take by descent from him, but from the original donor; and so paramount the mesne's charges⁴. But if no act of ownership be exerted by the mesne remainder-man or reversioner, or if such remainder or rever-

² *Stringer v. New*, 9 Mod. pl. 19; and *Marchioness of Tweedale v. Earl of Coventry* 363.

³ 8 P. Wms. 401.

et al. 1 Bro. Ch. Ca. 240.

⁴ See Bro. Abr. "Assets,"

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sion be not taken in execution for the debt, or other act of the mesne owner, such remainder or reversion cannot be subject to *possessio fratris*, dower^c, or curtesy^d. And, therefore, if land be given in tail, and the reversion in fee-simple descend or come to the tenant in tail, yet, during the estate-tail, he cannot be seised of such reversion so as to make a *possessio fratris*. Thus, where a person, having issue a son and a daughter by one wife, and a son by another, gave his land to his eldest son in tail, the sister could not inherit to him; for it is a *possessio fratris* which makes the sister inherit, and not a *reversio fratris* (1).

Thus, while the estate continued, he could not be actually seised of the reversion in fee-simple, so as to turn the descent; for he could not be seised of both in possession at one and the same time, and an estate-tail will not merge in a fee^e. But, had he become tenant after possibility of issue extinct, it would have been otherwise; for though, as to some respects, the estate-tail may be said to have continued after possibility, &c. in the tenant during his life, yet, in other respects, it in a manner ceased, and the tenant or donee would have been *quasi* tenant for life only, when such his estate would merge in the fee, which would then become executed in possession, and consequently be subject to *possessio fratris*, dower, and curtesy^f.

^c 8 Co. 96, a; *Cordal's* case, Cro. Eliz. 316; Co. Lit. 61, a; 8 Co. 74, b. 75, a; 31, a. 32, a, and b. 35 a, and b. ^e Plowd. 230, 296; 2 Co. 61, a; 8 Co. 74, b. 75, a; Kitch. 153, &c. Perk. s. 88; 2 Blac. Com. 177.

^d Perk. s. 467; Dyer, 357, pl. 44; Co. Lit. 29, a, and b. ^f See Watk. Desc. 146, and cases there cited.

(1) See authorities cited Watk. Desc. 143; Gilb. Ten. 13; *Cunningham v. Moody*, 1 Vesey, 174; and see the case of *Jenkins on demise of Harris and Wife v. Pritchard and others*, in 2 Wils. 45, & Watk. Desc. 143; where the case in Wilson is said to be misreported, and that it was, in fact, determined in direct support of the doctrine above laid down, it being determined in favour of the daughter by the second *ventre*.

Again, if the heir enter on the death of the ancestor, and his entry be defeated by the endowment of his mother, he can have no actual seisin of the reversion of the third or other part of his mother, while such part continues in dower^s. Nor can he have any actual seisin of lands of which his father is tenant by the curtesy^h; nor of such as are expectant upon a lease, or other estate, for life^l. Thus, when there is an anterior estate of freehold, the actual seisin is in the possession of such freeholder; and, consequently, the person entitled to an interest expectant thereupon, cannot be said to be actually seised thereof on a mesne descent. When, therefore, one estate in fee-simple is limited on another, by way of executory devise, it must fall under the same rule; and the descent of the contingent fee cannot allow of any mesne seisin by which such descent might be turned.

Hence, we perceive, that the principles which apply to the descent of an estate in possession do not apply to the descent of an estate in remainder or reversion expectant on an estate of freehold. But they apply when the particular estate is only for years; a tenant for years being, as we have before observed, considered merely as the bailiff of the freeholder, and as holding the possession for him^k.

It becomes necessary, therefore, to consider to whom a person must make himself heir, who claims an estate of which there has been no mesne seisin. If, as has been observed, there can be no mesne seisin of any estate expectant upon a freehold, whilst such estate continues to

^s Gilb. Ten. 27; Co. Lit. 241, b.

^h See Lit. s. 394; Co. Lit. 241, b.

^l Cro. Car. 411, 412; *Reeve v. Malster*, Cro. Eliz. 315-16; 3 Co. 6, b; 8 Ib. 9; Gilb. Ten. p. 15, 19; Co. Lit. 11, b. 14, a, note (6). 17, b; and Ibid.

note (4); also Ibid. 239, b 241, b; *Smales v. Dale*, Moore, 868, pl. 1201; *Kellow v. Rowden*, Carth. 128; and *Cunningham v. Moody*, 1 Ves. 176.

^k See Co. Lit. 239, b, n. (2); Watk. Desc. 149.

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descend; and no particular acts of ownership have been exerted, it follows that there can be no mesne heir (as such) capable of turning the descent; and, consequently, he who claims, must make himself heir to the person in whom such estate first vested by purchase; or, in case such acts of ownership have been exercised, then to the person who last exercised them. Thus, if, in the case before put, a gift in tail be made, and the reversion descend to the eldest son (by a first *ventre*) of the donor; which eldest son, being also tenant in tail, dies, leaving a sister of the whole and a brother of the half-blood, the brother of the half-blood shall succeed to the reversion, and not the sister of the whole; because the reversion descends, on the death of the eldest son, not to the right heirs of such eldest son, (for such eldest son was never actually seised of the reversion, but of the estate-tail on which it was expectant), but to the right heirs of the father, or of the person who made the gift, or of him to whom limited, given, &c. And, therefore, as the younger son by the second *ventre* was, on the death of the eldest son by the first *ventre*, the right heir of their common father the donor, (for he was of the whole blood to him, and, being a male, shall be preferred to an elder female, and so take place of his sister¹), such younger son shall succeed to the reversion as well as to the estate-tail.

Heir of the
first purchaser.

When, therefore, a reversion or remainder, expectant upon an estate of freehold, continues in a course of descent, without such acts of ownership exerted, such reversion, &c. still continually devolves, on the death of each particular heir, to the person who can then make himself heir to the donor or purchaser, without any regard to the particular heir of the precedent person who succeeded to it by descent, till, upon the determination of the particular estate, it ultimately vests in possession in him who at such determination is the right heir of such donor, purchaser,

¹ See 2 Blac. Com. 212; Can. II; Watk. Desc. 152.

or original remainder-man; for, as there was no intermediate person actually seised of such reversion or remainder, no one could be the mean of turning its descent, and becoming a new stock or *terminus*; but such stock must still be the donor, purchaser, or remainder-man, and must so continue (if no alienation be made) till such estate shall become vested in possession; and, consequently, it will be absolutely necessary to prove, on every devolution, a descent, not from the immediate predecessor who took by descent, (for with him, as such, we have nothing now to do), but from the donor, purchaser, or original remainder-man. Whoever, therefore, can make himself heir to such donor, &c. will be entitled to the inheritance in reversion or remainder, though expectant; but yet not so as to be capable of transmitting it to his own right heirs, as such, except by granting it over, till, by the determination of the particular estate which supported it, or upon which it was expectant, (when it would cease to be a reversion or remainder), it becomes vested in possession in him who would be, at that time, the right heir of the donor, &c. which person would then, upon his obtaining an actual seisin, become the stock of descent, from whom the future pedigree must run^m.

And it is the same with respect to contingencies and executory devises; as, where there was a devise to G. in fee; but, if he died under the age of twenty-one years, leaving no issue, then to P. in fee; after the decease of the testator, P. died in the life-time of G. who afterwards died under the age of twenty-one, and without issue: was held, that the lands vested in P.'s heir at law, upon the happening of the contingency, (viz. on the death of G.

Contingencies
and executory
devises.

^m See Fearn's Conting. Plowd. 56, 113, 485, 489; Rem. 449; Co. Lit. 11, b, Frederick v. Frederick, Cro. 14, a, and n. (6), 14, b. 15, Eliz. 334; Bonvil v. Payne, a; 3 Co. 42, a; Reeve v. Dyer, 129; Cunningham v. Malster, Cro. Car. 411; 1 Moody, 1 Ves. 174. Co. 95, 99; 8 Co. 96, a;

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under age, and without issue), but that the interest, while it was contingent, did not so attach in G. who was heir at law to P. on her decease, as to carry it, on his death, to his heir at law; who was not heir at law to P; but that it vested in that person who was heir at law to P. (the first purchaser) at the time of the contingency happening^a.

For the more fully elucidating these doctrines, and in order to show at one view the different manner in which an estate vested in possession, and an estate in remainder or reversion expectant upon a freehold would descend, Mr. Watkins has subjoined to his Essay on Descents, a table or calendar, thus explained:—Suppose an estate be given to Henry Warden, in tail^o, with remainder over in fee to Benjamin Brown. On the death of Benjamin Brown, the remainder would descend, 1st, to his eldest son William Brown, by Anne Lee, and from him, 2dly, to Isaac Brown, his eldest son, by Sarah Watts. Isaac dying without issue, we must again seek the right heir of his father William, as the representative of his grandfather Benjamin, for Isaac having never been actually seised, could not transmit it to his own heirs (as such). Now we perceive by the table, that William Brown left a daughter by his first wife, and a son by his second; these, his children, are both in the same degree; but the younger being a son, and so more worthy of blood, he (George) shall (3dly) succeed to the inheritance, in exclusion of his elder sister.—George dying without issue, we must again seek the heir of his grandfather, which now is (4thly) Lucy Brown.—Lucy dying likewise without issue, whereby her father's issue are extinct, we must still inquire for the heirs of the remainder-man, whom we now find to be (5thly) John Brown (his son by his second wife). The remainder then

^a See *Goodright v. Searle*, 10 Cro. Car. 410, 413; *Wils.* 29; and cited also *Cowden v. Clarke*, Hob. 33; in *Fearne on Cont. Rem.* Plowd. 485, 489.
448; and see *Reeve v. Mal-* ^o See Tab. Desc. IV.

descends from John to (6thly) his eldest son Edmund; and from him to (7thly) his only son James.—James dying without issue, we must once more seek the heir of the remainder-man, whom we find among the yet living issue of John Brown; for John leaving a daughter by one wife, and a son and daughter by another, the remainder descends (8thly) to Henry his son by Frances Wilson, as of the worthiest sex; but he dying without issue, we again seek the heir of Benjamin, and find that John left two daughters also, Penelope Brown, and Felicia Brown, by different wives; these daughters being in the same degree, and both equally the children of their common father, through whom they derive their title to inherit (1) shall (9thly) succeed as parceners. One of these daughters dying without issue in the life-time of the other, the other shall then succeed to the whole; for she does not claim as heir to her deceased sister, but as the now only heir of her father. But the surviving sister dying also without issue, we pursue our old inquiry, and ask again for the heir of Benjamin, the remainder-man; and as his male issue is now extinct, and as he left two daughters, Susannah and Catherine, (by different wives), we find that they or their issue shall (10thly) next inherit, as heirs to him. On their death, or that of their issue, whereby the descendants of the remainder-man are become extinct, we must yet seek his right heir; and this we find to be (11thly) Bridget Brown, his sister of the whole-blood; for though the half-blood

(1) Sisters of the half-blood cannot succeed as heirs to each other; but they may succeed as the heirs of their common father, being equally his children. The same law as to sons or daughters in gavelkind. 8 Mod. 208; *Turner v. Turner*, Robins. Gavelk. b. 1, c. 6, p. 100–105; *Foxe v. Smith*, 1 Freem. 45; and see Robins. b. 1; c. 3, p. 37, where a custom is noticed for lands to descend to, and be partible among, brothers by the first ventre only, to the exclusion of those by a second. See also Co. Lit. 140, b.

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succeed equally with the whole among the descendants of Benjamin, according to the worthiness of sex or priority of birth, yet such remainder being legally vested in Benjamin, he alone is the person from whom it can be claimed, and to whom the person claiming must make himself heir: for those whom we have called the half-blood among his descendants, are only of the half-blood to each other, but are equally derived from him. But those of the half-blood above him, being not (by the terms) derived from the same couple of ancestors as he is, cannot possibly succeed as heirs to him. And, therefore, though Timothy Brown is the right heir (on the death of Benjamin and his issue), to Joseph Brown their common father, yet it is not his heir that we seek, but the heir of Benjamin; and as he is not the heir of Benjamin, (being by the second *ventre*, and therefore of the half-blood only to him), he shall not succeed to the remainder, but such remainder shall descend to Bridget his sister, of the whole-blood, *i. e.* by the first *ventre*: but in case she die without issue, it shall then go (12thly) to Thomas Brown, her uncle; and the issue of Joseph Brown by Emma Atkins, the second *ventre*, shall be excluded, as they can never be the right heirs of Benjamin, the first purchaser, from whom it must still be claimed.—On the death of Thomas Brown, without issue, the remainder shall (13thly) go to his uncle Daniel Brown; and not to his brother Joseph Brown; because Thomas having never been seised, it would not on his death go to his heir, but to the heir of Benjamin: and Joseph being the father of Benjamin, could never be (as such) his heir^p: and Stephen, not being derived from the same couple of ancestors as Benjamin, shall not succeed. From Daniel it shall (14thly) go to Abraham, the son of Edward and Barbara Brown.

But had the estate we are speaking of been an estate in possession instead of reversion, it would have descended

^p See Show. 246.

very differently; for it would then have gone from Benjamin to (I.) William; then to (II.) Isaac; and from Isaac to (III.) Lucy Brown; who being the person now last actually seised, (supposing the persons entitled, continually to have gained an actual seisin), is become the stock of descent, and therefore we must now seek for the heir of her, and not of Benjamin. Her father, William Brown, left issue a son, (George) by his second wife; but this son being but of the half-blood to Lucy, shall never inherit as heir to her. We then must go one step higher; and here we find (IV.) her aunt Susannah to be her heir of the whole-blood. Susannah dying without issue, the estate again devolves; and as we suppose her to have been actually seised, we must find out who is heir to her; and this we discover to be now (V.) George Brown, the son of her brother William, who, though of the half-blood to Lucy, is of the whole blood to Susannah, and, therefore, shall inherit to her¹. And now all the issue of his grandfather Benjamin, by his first wife Anne Lee, being extinct, we must go to (VI.) Bridget, the daughter of Joseph and Elizabeth Brown; for the issue of Benjamin, by Jane Smith, being of the half-blood to George, shall never inherit as heirs to him. But Bridget succeeding, and having been actually seised, we must now have recourse to her heir; and this we find to be (VII.) John Brown, the son of Benjamin, by Jane Smith; for though of the half-blood to George, he is lineally descended from the only brother of the whole-blood to Bridget, and shall therefore (as the elder issue of Benjamin are now extinct), succeed to her². From John it descends to (VIII.) Edmund; and from Edmund to (IX.) James; and from James to (X.) his aunt Penelope; and from Penelope to (XI.) her aunt Catherine: for though the issue of her father, John Brown, by Frances Wilson, are but of the half-blood to Penelope, yet they are now the only representatives of John, who was the brother of the whole-blood

¹ See Lit. sec. 8.² Ibid.

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to Catherine; and, therefore, the estate shall descend from her to (XII.) Henry Brown; and from him to (XIII.) Felicia; and she being the last of the issue of her grandfather Benjamin, we find Thomas, the son of Philip and Esther, to be (XIV.) her heir; for as to Bridget, the daughter of Joseph and Elizabeth, it has already passed her; and Timothy, the son of Joseph and Emma, is but of the half-blood to Felicia, and therefore shall not succeed to her; but he shall succeed as heir to Thomas, being the now only son of his brother Joseph, (his brother of the whole-blood). From Timothy (XV.) it goes to (XVI.) Daniel; and from Daniel to (XVII.) Stephen; and from Stephen to (XVIII.) Abraham Brown and his issue, &c.

In the annexed Table the descent is traced in the paternal line only of the purchaser. The succession into the maternal line being, it is imagined, sufficiently marked out in the preceding Table of Descents, III. given after Sir William Blackstone, by which (it may be proper just to notice) it will appear that on the extinction of the issue, and also of the paternal heirs of Benjamin Brown, the remainder or estate in possession (for the descent of either must, in this respect, be perfectly the same) would go to the right heirs of Barbara Finch (XIX. & 15.); on their failure, to those of Margaret Pain (XX. & 16.); and, on default of her heirs, to those of Esther Pitt (XXI. & 17.); and, for want of such, to those of Elizabeth Webb (XXII. & 18.) the mother of Benjamin. The rule always being to give the preference to the paternal line, and not to have recourse to the maternal till the paternal be exhausted.

Again, in tracing the paternal line, we begin with the father of the person last seised, or first purchaser, and proceed *upwards* through the grandfather, great grandfather, &c. as far as the line can be pursued. And when the heirs on this part can be no longer discovered, we begin with those of the wife of that paternal ancestor with whom our discoveries ended, and proceed downwards to the heirs of

the mother; thus it first goes to (11.) Bridget; then to (12.) Thomas; then to (13.) Daniel; then to (14.) Abraham, &c. But if we seek the heir of Benjamin in the maternal line, we begin with (15.) Barbara; then proceed to (16.) Margaret; then to (17.) Esther; and then to (18.) Elizabeth.

III. THE MEANS BY WHICH THE ORIGINAL COURSE OF DESCENT MAY BE BROKEN OR DIVERTED.

We have seen, that an estate derived *ex parte materna* will, so long as it continues in a course of descent, be inheritable by none but such as claim from her, or her line of ancestry, but that if an estate so derived from the maternal line by descent be once fixed in the maternal heir by *purchase* and not by *descent*) he will become a new ancestor, and the estate thenceforth descend to his heirs *general* with a preference of the *paternal* to the maternal line, as in other cases of a seisin *ut feudum antiquum*. Hence it becomes material to consider what acts, and what form of limitation, by the person last seised of an estate *ex parte materna*, will amount to such a new acquisition as to vest the estate in him or his heirs by *purchase*.

As to which it may, first, be observed, that in order to effect a change of descent to the paternal line, the person seised *ex parte materna* must acquire a new estate, for if he be in by the conveyance in anywise as of his old estate, he cannot be in as a purchaser, and the descent consequently will not be changed. A person cannot, therefore, raise a fee-simple to his own right heirs (by the name of heirs) as a purchaser or purchasers, unless he parts with his whole estate, for if the reversion expectant on the particular estate granted by him, remain in him, this, as a part of his old estate, will continue in its original channel of descent: nor can he make the heirs of his body take by purchase by any conveyance operating by the common law.

Thus, if he limit an estate to A. for life, with remainder

• Co. Lit. 22, b; 1 P. Wms. 359, 387.

• Ibid.

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But if the grantor part with his whole estate, and then a limitation be either to his heirs general or special, such heirs shall take by purchase; for here the reason fails; the limitation cannot be considered as the reversion, for that is always a part of the estate granted which remains in the grantor^{*}; but where the whole is granted, there is nothing which can remain in him. If, therefore, a person grants to A. and his heirs for ever, he can have no reversion left in him; and hence any estate limited afterwards to him or his heirs, must be a new estate, and be taken by purchase. Thus, says Coke, if A. seised *ex parte materna*, make a feoffment in fee, and take back an estate to him and his heirs, this is a new purchase; and if he die without issue, his heirs on the part of his father shall inherit. This, however, as is observed by Mr. Hargrave, must be understood of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the lands; and the second regranting the estate to him. For if in the first feoffment the use had been expressly limited to the feoffor and his heirs, or if there

* Co. Lit. 22, b; 2 Blac. Com. 175. * Co. Lit. 12, b.

(1) But if it had been by way of use, as to A. and his heirs, to the use of B. for life, with remainder to the use of the heirs of the body of the donor; the heirs of his body would take by purchase. See Carth. 272; Watk. Desc. 281. Yet had the remainder been (or had there been a subsequent remainder) to his heirs general, they would have taken by descent, and been in of the old estate. Ibid. But note, in order to make the heirs of the grantor or donor to take by purchase, the estate must be so limited as to exclude the presumption of an implied life-estate in such grantor; as, otherwise, such limitation to the heirs of his body may fix in the ancestor, and so the heirs be in by descent. See Watk. Desc. 164. 281.

was no declaration of uses, and the feoffment was not on such consideration as to raise an use to the feoffee, and consequently the use resulted to the feoffor; in either case he is in of his ancient use, and not by purchase². Thus, if an estate, descended *ex parte materno*, be conveyed to A. and his heirs, to the use of him and his heirs, upon certain trusts; and ultimate limitation of such trust be expressly made, or a portion be unlimited, and so result to the person conveying, or his heirs, such trusts, so limited or resulting, will be part of the old estate, and go to his heirs by descent; for trusts are subject to the same rules, as to descents, as legal estates³. And though the grantor thus divests himself both of the legal estate and the use, yet the beneficial interest belongs (when not otherwise disposed of) to the person who would have been entitled to the legal estate if it had not been conveyed; in the same manner as the use would have done before the statute on the conveyance of the legal estate. And as a trust now is what a legal estate was before the statute of uses, it must follow that, as such use, whether expressly limited or resulting, was the ancient use, a thing collateral and annexed in privity to the estate of the land, and to the person touching the land, and so, as it were, a portion of the old estate, such trust, so limited or resulting, must be a portion of the old estate also⁴.

But, if such trust estate descend *ex parte materno*, and the legal estate be afterwards conveyed to the *cestui que trust*, he shall take such legal estate by purchase; and consequently it shall go, on his death, to his heirs on the part of his father; and the trust estate shall merge in the legal when they both become fixed in him⁵. Thus, where a woman conveyed an estate to trustees, in trust to permit

² Co. Lit. 12, b, n. (2); and see Ib. 13, a, and 22, b.

³ *Banks v. Sutton*, 2 P. Wms. 713; Ib. 736; Watk. Desc. 285.

⁴ See Watk. Desc. 286, and authorities there cited.

⁵ Ibid.

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her to receive the profits during life ; and (after several mesne limitations of such trust) in trust for her right heirs. The trust descended ; and afterwards one who was her heir, as to a moiety of the premises, had the legal estate conveyed to him by the trustee ; and it was held, that the legal estate vested in him by purchase, and that it should descend to his heirs on the part of the father, and could not follow the old use ^b. For, as to heirs *ex parte paterna vel materna*, it does not appear that an heir of one sort has been ever held, even in equity, to be as a trustee for an heir of the other ; but when the legal and trust estates concenter in the same person, the trust estate becomes absorbed in the legal ^c.

And, upon the same principles, it should seem that if lands be mortgaged in fee, and, after forfeiture, be reconveyed to the heir at law, the legal estate will, on such reconveyance, vest in him as a purchaser^d, and consequently go to his heirs on the part of his father, although he takes the equity of redemption by descent ; for a mortgagee, till foreclosure, is considered, even in equity, as a bare trustee for the mortgagor, as to the inheritance of the mortgaged estate ; and we have seen, that on the conveyance of the legal estate by a trustee to the *cestui que trust*, the legal estate will vest in him by purchase, and his equitable interest be merged.

If a person seised *ex parte materna* make a feoffment in fee, reserving a rent to him and his heirs, the rent will go to his heirs *ex parte paterna* ^e. But otherwise of a rent reserved on a grant of such estate for life or in tail^f ; for, in this case, the reversion is left in the grantor, which will descend to his heirs on the part of his mother ; and the

^b *Doe ex dem. Balch v. Putt*, Dougl. 773, 777. Mod. 49 ; *Doe dem. Harman et Ux. v. Morgan*, 7

^c Dougl. 779 ; *Sir John Robinson v. Comyns*, Ca. T. Durnf. & East, 103 ; Watk. Desc. 288. Talb. 164.

^d See *Benson v. Scott*, 12

^e Co. Lit. 12, b.

^f Ibid.

rent will follow such reversion as its incident : but when the grant is in fee, there is no reversion to which it can attach ; and, consequently, it must be considered substantively a new estate.

So if *A.* having a lease to her and her heirs for lives, devise it to her daughter, and afterwards the lease be renewed ; this last is a new lease, and, as such, shall descend to the heirs on the part of the father^s.

A fine *sur conusance de droit come ceo*, &c. levied by tenant in tail, we have seen, affects not the reversion or remainders over, when in another person. But if he has the fee in himself, the fine (if levied with proclamations, and it shall be supposed to have been so levied until the contrary be shown) extinguishes the estate-tail, and brings the reversion into possession. And consequently, this being the old fee, if it had descended *ex parte materna* before the levying of the fine, it will still do so ; as the fine affects if no otherwise than by bringing it into possession.

Fine affecting descent.

But if a person, seised *ex parte materna*, levy a fine *sur done, grant et render*, it will operate as a feoffment and re-enfeoffment, and give him a new estate ; which shall, consequently, descend to his heirs on the part of the father^a.

But yet, it is to be observed, that although on a fine *sur done, grant et render*, the uses rendered to the conusor are new uses, because the estate has passed to the conusee ; yet, as such fine is a double fine, comprehending the fine *sur conusance de droit come ceo*, &c. and that *sur concessit*, the conusee takes his estate by the fine *sur conusance*, &c. and the estate or uses so rendered by him, is a portion of, or are served by, that estate : and, therefore, in case such estate be not wholly rendered to the conusor or a stranger, but a part be also limited to the conusee or his heirs, such

^s *Mason v. Day*, Pre. Cha. 319 ; *Pierson v. Shore*, 1 Atk. 480. ^a Carth. 140 ; *Rice v. Langford*, Dyer, 311, pl. 84.

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part is a portion of the estate so taken on the fine *come ceo*, &c.: and, consequently, the uses so limited on the fine *sur concessit* to the conusee or his heirs, are not new uses, but must be considered as his old reversion: as, for instance, if a fine be levied to husband and wife and the heirs of the husband, and they, by the same fine, grant and render the tenements to the conusor for the life of the husband, remainder to a stranger for life, with remainder to the heirs of the husband: the heirs of the husband will take by descent, and not by purchase, because the estate, so ultimately limited to the heirs of the husband, is nothing else but the reversion which continued in him expectant upon the determination of the estate granted by the render¹. So if the render be in tail, (i. e. of a portion only of the estate) the conusee shall have the reversion to his own use². This is, however, the only species of fine which gives a new estate: for if a person, seised *ex parte materna*, levies a fine *sur conusance de droit come ceo*, &c. and either makes no declaration of the uses, or declares it to be to the use of himself and his heirs, the lands will still descend *ex parte materna*; because it is still the old use, which consisting in trust and confidence, will follow the nature of the land, and will descend as the land would have descended if no alteration had been made; and it is totally immaterial whether the use be expressly declared upon such fine, or permitted to rise by implication.

Recovery affecting descents.

A common recovery being now considered simply as a common assurance or form of conveyance, it is equally governed by the intention of the parties with respect to its operation; though, therefore, a recovery like those conveyances passes a fee, yet the fee created by it is to the use of the recoveror, unless the contrary appears to be the intention of the parties¹, and he being thus in of his

¹ See *Bromley v. Bennett*, Dyer, 237, pl. 31; Watk. Desc. 294.

² See Moore, 46, pl. 138.

¹ See *ante*, vol. iv. p. 547.

ancient use, and the statute uniting to it the possession, he is considered as in altogether of his old estate; and the descent consequently remains unaltered. Thus, if a person, seised *ex parte materna* in fee, suffer a recovery, and no uses be declared, nor any consideration appear to raise them to the recoveree, the uses result; or if the uses be declared to the recoveree and his heirs, he is in of his old estate, which shall continue to descend as if no recovery had been suffered^m. So if a tenant in tail, seised by descent *ex parte materna*, suffer a recovery, the fee acquired by such recovery will descend to his heirs on the part of his mother, for the fee-simple will descend in the same line as the fee-tail, from which it was descended. But if he were to take the estate-tail by purchase, the fee so created would go to his heirs on the part of his father, whether the lands be freehold or copyholdⁿ.

And it may be remarked, that if a fine and recovery be for a particular purpose, the several deeds, fine and recovery shall all be considered as one conveyance, and neither of them be permitted, by its peculiar properties, to operate so as to destroy the intent of the parties^o. As where husband and wife covenanted to levy a fine of lands descended to the wife from her mother, which was levied accordingly, and a recovery afterwards suffered; it was held, that the deed, fine and recovery made but one conveyance; and the estate moved originally from the conveyor, (which in this case was the feme;) and that what she had not parted with was still in her; and, therefore, so

^m *Stapilton v. Stapilton*, 1 Atk. 9; *Lord Derwentwater's case*, 1 Wils. 74; *Watk. Desc.* 296.

ⁿ *Roe dem. Crow v. Baldwere et al.* 5 Durnf. & East, 104.

^o *Parsons v. Freeman*, 3 Atk. 748; *Sir John Ferrers et al. v. Sir Richard Fermor et al.* Cro. Jac. 643; *Selwyn v. Selwyn*, 2 Burr. 1131; *Roe dem. Noden v. Griffith*, 1 J. Blac. Rep. 222, 251; S. C. 1 Ibid. 605; *Vaughan dem. Atkins v. Atkins*, 5 Burr. 2787.

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much as was not declared of the uses upon the recovery was still to the old use; the nature of the common recovery being but as an instrument for raising the use^p.

Lastly, it may be noticed, that when the legal estate descends in fee-simple *ex parte materna*, and the equitable estate *ex parte paterna*, or *vice versâ*, the equitable estate shall merge in the legal, and both shall follow the line through which the legal estate descended^q. So also if the equitable estate had descended *ex parte materna*, and the heir had had the legal estate by purchase, the equitable estate would merge and be utterly extinguished in the legal; which would, of course, go to the heirs on the part of the father^r.

And, when the question is between those of the paternal and those of the maternal line, the law always gives the preference to the former^s. For where two titles unite, the party shall be in of the best; and as the clear legal fee-simple is, in these cases, the best, the party shall therefore be in of it^t.

Devise to the
heir.

Wherever a devise of lands, of which a person is seised *ex parte materna*, gives to the heir the same estate in quality as he would take by descent, although he charge them with debts or other incumbrances, the heir shall be in by descent, and the lands, on his death without issue, go to his heirs on the part of his mother^u, because descent is the title most favoured in law. And whether the land be freehold or copyhold, it will be the same; for the sur-

^p *Beckwith's case*, 2 Co. 57, b; *Cromwell's case*, Ibid. 77, b; *Hurd v. Fletcher et al.* Dougl. 44, 46.

^q *Goodright lessee of Alston v. Wells*, Dougl. 771, 780; *Wade v. Paget*, 1 Bro. Chan. Ca. 363; *Philips v. Brydges*, 3 Ves. jun. 126; *Selby v. Alston*, Ibid. 339.

^r Ibid.

^s *Per Willes*, Just. Dougl. 778.

^t *Per Buller*, Just. Ibid. 779.

^u See Co. Lit. 12, b, n. (2), and authorities there cited; and *Watk. Desc.* 268.

render and admission of copyholds will not make a new estate¹ (1).

But if the devisor alter the estate, and limit it differently from what it would have descended to the heir, the heir shall take by purchase, it being another estate; which must descend from such heir, as the first purchaser, to the heirs on the part of his father. And therefore if a person seised in fee devise his lands to his eldest son in tail, the son, though heir at law, shall take by purchase; for it is a different estate from that which would have descended to him². And if the devisor had been seised *ex parte materna*, or if a mother had so devised to her son, as the devisee would take such entail as a purchaser, should he afterwards suffer a recovery, the fee so effected would descend to his heirs on the part of his father³.

So whenever a person, seised in fee, devises an estate to his heir at law, and limits a remainder over, the heir shall take by the devise, and be in by purchase². But if, on the other hand, he had devised the particular estate to a stranger, and the remainder over to the heir in fee, the heir should be in by descent. Hence a distinction is to be noticed, when the heir takes a particular estate and the ultimate limitation be to a stranger, and when the particular

¹ *Smith v. Trigg*, 1 Strange, 487.

² See *Martin v. Strachan*, 1 Wils. 66.

² See *Wills v. Palmer*, 2 Blac. Rep. 687, and 5 Burr. 2615.

² See *Wills v. Palmer*, 2 Blac. Rep. 687.

(1) And it is to be noted, that it is not in the election of the heir to be in by purchase or by descent; for as the law casts the descent on him immediately on the death of the ancestor, the devise is in such case absolutely void. And, could the heir, by his election, have taken by purchase, he would have defeated his lord of many emoluments of his seignior, and deprive the specialty creditors of his ancestors of the fund which was answerable for their demands; for till the statute of Will. 3. the devisee was not chargeable with the debts of the devisor.

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estate be to a stranger and the ultimate limitation to the heir at law. The estate taken by descent must be the old fee; but the ultimate limitation to a stranger necessarily prevents the prior one to the heir from being a fee; and consequently, that so taken by the heir must be a different one from that which was in the ancestor. Whereas, if the ultimate limitation be to the heir at law, it must be part of the old fee, undisposed of; the devise being void so far as it conveys the same estate, in point of quality, as that which would have descended to him, and which was once in the ancestor^a.

So, in the case of an executory devise, the heir at law shall take the estate by descent until the contingency arise; for until that event, the fee is not affected; and, consequently, the same estate which was in the ancestor devolves to the heir^b.

But if a person having several daughters, who would be his heirs at law, devise to them in fee, they shall take as purchasers. For though they would have succeeded to him as his heir, yet that would be in parcenary; whereas, here they take in joint tenancy or common^c.

So, where A. having two daughters, (one of whom died, leaving a son), devised his land to the son of his deceased daughter; the son took as a purchaser. For, "by this devise there was an alteration of the estate; for if the land had descended, both the daughters would have been but one heir, and would have taken as coparceners: but when a devise is made of all to one, or the son of one, of the daughters, then the devisee takes by purchase in a different manner from what would be, in case the land had descended^d.

So, if a person has several sons, and, being seised of

^a Watk. Desc. 175, 273.

^b Ibid. (134), 276, 278.

^c Cro. Eliz. 431, pl. 36;

Rigden v. Vallier, 3 Atk. 731.

^d Com. Rep. 123, ca. 86;

and *Reading v. Royston*, 2

Ld. Raym. 129.

lands in gavelkind, devise to them; they would take by purchase, as joint-tenants, or as tenants in common^e.

So, if one seised of lands at common law, devise them to his eldest son and a stranger, it is a good devise; and they shall take as joint-tenants^f.

But if the testator devise to his son and a stranger, or to two or more of his sons (one only being his heir, in common, it should seem that the son, being heir at law, shall take his portion by descent. For, as observes Mr. Fearne^g, if we suppose a testator to devise a moiety, or any other share of his real estate to a stranger, making no disposition at all of the remaining undivided share, such remaining undivided share would, of course, descend to his heir at law, and he must hold in common with the devisee of the undivided share devised. Hence, it is clear, that an heir may take by descent, as tenant in common with a devisee, an undivided part of the estate, of which his ancestor was solely seised; and it seems to be immaterial, whether the share he would so take, be expressly devised to him, or left unnoticed by the will; for if expressly devised, he would take it in common, and, if not noticed, he would take it in the same manner; and a devise to two, as tenants in common, is, in effect, a devise of one undivided part to one, and of another undivided part to the other; so that under such a devise to an heir and another, as tenants in common, the heir takes as if one undivided moiety were devised to the other, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will; in which case, he would have taken by descent; and, therefore, the same estate being devised to him in such residue as he would have taken by descent, the general rule, respecting devises to an heir, seems to extend to it. "It has, indeed, been held, that a devise to

^e *Rigden et al. v. Vallier*,
3 Atk. 731, and authorities
there.

^f Godb. 94; and see *Dally*
v. King, 1 Hen. Blac. 1.

^g Posth. Works, 130, 132;
Watk. Desc. 276.

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^b 1 Lutw. 797; and 1 Dyer, 124, a, pl. 38; 2 Salk. 241; *Scott v. Scott*, Leon. 11; 3 Ibid. 64, 70. Ambler, 383.

it was adjudged that the heir, having attained twenty-four, was in by descent. In this case, therefore, the heir was not to take till he attained twenty-four; but, so soon as he would have taken, he would have taken the absolute fee, (not a base fee, as in *Scott v. Scott*); and as he would have taken an absolute fee under the will, it would have been the same estate as he would have taken without the will; and, consequently, he would be in by descent, as of the worthier title^k.

IV. THE MEANS BY WHICH A DESCENT MAY BE DEFEATED OR PREVENTED, AND THE HEIR MADE TO TAKE BY PURCHASE.

In order to investigate this point, it will be necessary previously to inquire, what the requisites are to a person's taking by purchase,

"A person shall take by purchase when he takes an estate which never vested or attached, or could have vested or attached, in the ancestor^l."

When a person shall take by purchase.

As, if a son purchase an estate to him and his heirs^m. So, if a remainder be limited by a stranger to the right heirs of a person who takes no previous estate himself, the heir takes by purchase, for there being nothing in the ancestor, nothing can descend: thus, if there be husband and wife, who have issue a son, and lands are letten to one for life, with remainder over to the heirs of the wife; and before the remainder falls, the husband and wife die; the son shall take by purchase; and, therefore, if he die without issue, his heirs, on the part of the father, (or husband), shall inherit, and not those on the part of the mother (or wife)ⁿ (1).

^k Watk. Desc. 280.

^m See Lit. s. 4.

^l 2 Watk. Desc. 231.

ⁿ Co. Lit. 13, a. 298, a.

(1) But if the limitation be to the heirs special of a person who takes no estate himself, and in whom such remainder could not attach, the heirs special shall not, it seems, take absolutely by purchase; nor indeed, absolutely by descent, but intermediately between both. See Co. Lit. 14, a, n. (6); Hal. MSS.; Fearn, C. R. 108.

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Rule in *Shelley's* case.

The particular estate and remainder must be created by the same conveyance.

But where an estate is limited to, or remains in, the ancestor, with remainder to his heirs general or special, the remainder and the particular estate are considered in many cases as coalescing, or, in other words, the remainder fixes or vests in the ancestor, and unites with the particular estate; in which case, the heir being in, as from his ancestor, and not *per formam donis*, takes by descent. Thus, by the rule in *Shelley's* case, so often mentioned, when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, the word *heirs*, is a word of limitation of the estate, and not a word of purchase (1).

But it must be noted, that in order to the application of this rule, both estates must be limited by, or derive their existence from, *the same* conveyance; or the estate in the ancestor be in him, as a portion undisposed of, of the estate moving from him, and by him so limited°. For if an ancestor have an estate for life, and an estate be limited of the same lands to his heirs by another conveyance, the heirs will, notwithstanding, take by purchase, and not by descent°. So, if the estate be limited to *A.* for life, with remainder to the heirs of *B.* and *A.* grant his estate to *B.* the estates will not coalesce, but the heirs shall be in by

° *Watk. Desc.* 234.

° *Ibid.* and *Moore v. Parker*, 1 *Ld. Raym.* 37.

(1) Rule in *Shelley's* case, 1 *Co.* 104; and see of this rule, *Watk. Desc.* 17, 233, and authors there referred to. And note, the rule applies as well to copyholds, as to freeholds; *Smith v. Triggs*, 1 *Stra.* 487; and to legal estates limited by devise, as well as by deed; *Atkinson v. Hutchinson*, 3 *P. Wms.* 259. So, also, as to trusts executed; *Glenorchy v. Bosville*, *Ca. T. Talb.* 19; *Garth v. Baldwin*, 2 *Ves.* 655. But trusts executory, (as marriage articles), are so moulded by the court as to answer the intent of the parties; *Ibid.* and *Roberts v. Dirwell*, 1 *Atk.* 608; but even in these cases, the rule prevails, if such intent is not violated by its application; *Ibid.* and see *Watk. Desc.* 253, n. (y).

purchase⁹. Again, where husband and wife were seised of a copyhold to them and the heirs of the husband; the husband, after a surrender to the use of his will, devised it to the heirs of the body of the wife, if they should attain to the age of fourteen years: the court agreed, that the devise did not operate as a remainder; for although the wife had an estate for life, yet this was a new devise, to take place after her death, and not a remainder joined to her estate¹. So, where the father settled lands on his son for life, retaining the reversion to himself, and afterwards devised them to the heirs male of such son, the estates were held not to unite; but the heirs male took the entail by purchase².

But it seems, that if lands be limited to *A.* for life, and, after *A.*'s decease, to such uses as *B.* shall appoint, and *B.* appoint to the heirs of *A.* that these estates shall coalesce; for *B.* being merely an instrument, when he appoints the estate, the appointee is in from the grantor; and the estate so appointed arises, and takes effect, from the deed by which such power was created; which, in the case put, was the same which limited the estate for life to *A.*³.

And although the person executing such power limit it subject to the payment of debts, it will make no difference, for if the quality of the estate be not changed, the charging it with incumbrances will not alter the descent⁴.

The particular estate, and the estate in remainder, must, moreover, be both of the same nature, viz. both legal, or both equitable. And, therefore, if the estate of the ancestor be legal, and that to his heirs be equitable, or vice

The remainder and particular estate must be of the same nature.

⁹ *Watk. Desc.* 234; and *Moor v. Parker*, 1 *Ld. Raym.* 37.

¹ *Ibid.*; *Snow v. Cutler*, 1 *Levinz*, 135.

² *Doe v. Fonnereau*, *Doug.* 487-509; *Goodman et al. v. Goodright*, 2 *Burr.* 873; *Lady Lanesborough v. Fox*, *Ca. temp. Talb.* 262.

³ See *Co. Lit.* 299, b, n. (1); and see *Cooke v. Duckenfield*, 2 *Atk.* 565, and 568; *Duke of Marlborough v. Lord Godolphin*, 2 *Ves.* 78.

⁴ *Hurst et al. v. Earl of Winchelsea et al.* 2 *Burr.* 879; *Co. Lit.* 12, b, n. (2).

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versâ, they cannot coalesce; for being of different natures, they cannot make one estate (1). Thus, if an estate be limited to the use of trustees during the life of A. upon trust, to permit him to take the profits; remainder to the heirs of his body; the estates will not unite; but the heirs shall be in by purchase². They must, moreover, be both freehold, and not one freehold, and the other for years: if, therefore, the estate be limited to the ancestor for years, with remainder to B. in tail; remainder to the right heirs of such ancestor; the right heirs shall take by purchase, when the remainder vests, and not by descent³.

The remainder must be to the heirs of the ancestor who takes the particular estate.

The subsequent limitation to the heirs must likewise be confined solely to the heirs of the ancestor taking the particular estate. So that, if it be to a wife for life, with remainder to the heirs of the bodies of husband and wife, the heirs of their bodies will be in by purchase, and not by descent, because the freehold was in the wife alone⁴.

But if the heirs be confined to those of the persons taking a particular estate, it matters not whether the estates of the ancestors be several, (provided they all take), or joint; nor whether the remainder over be to the heirs of all, or only of some, or one, of such ancestors. As if the limitation be to the husband for life, remainder to the wife for life, remainder to the heirs of the bodies of husband and wife, the heirs of their bodies shall take by descent⁵. So, to baron and feme, and the heirs of the

² See Fearne on Conting. Rem. 34; and see *Silvester v. Wilson*, 2 Durnf. & East, 444, 451.

³ Co. Lit. 319, b; 1 Co. 104, a.

⁴ See *Frogmorton dem.*

Robinson v. Wharrey, Blac. Rep. 728; Co. Lit. 219, a, n. (3); *Denn v. Gillot*, 2 Durnf. & East, 435.

⁵ See Watk. Desc. 240, and cases there; *Webb v. Webb*, 2 Vern. 140.

(1) See Fearne on Conting. Rem. 34, 81. In illustrating this rule, the references are chiefly made to this invaluable work; as most of the cases are there elaborately considered and referred to.

body of the baron, is an estate-tail, executed *sub modo*^b. So, to baron and feme for their lives, with remainder to the heirs of their bodies; the estate-tail is executed, and the heirs, in both cases, are in by descent^c.

Nor is it of consequence that the estate limited to the ancestor be such as that it may possibly determine in his life-time; for if it be to the widow during widowhood, or to a husband and wife during their joint lives, remainder to the heirs of the body of the widow or wife, the estate-tail will be executed^d.

Nor does it signify whether the estate of the ancestor be expressly given to him, or arise by implication of law, for in either case the rule will hold. As if A. seised in fee, covenant to stand seised to the use of his heirs male by his second wife; this estate-tail is executed in A, although he takes an estate for his life by implication only^e.

And an estate may, it seems, result, or arise by implication, in the case of a trust, as well as of a legal estate^f.

Nor is it material whether the estates to the ancestor and the heirs be mediate or immediate, for if the limitation be to A. for life, remainder to the heirs of his body; or to A. for life, remainder to B. for life, remainder to C. in tail male; remainder in tail general; remainder to the right heirs of A. the remainder will be executed in A. and his heirs take by descent^g.

And whether the estate limited to the heir be such as must necessarily, or may possibly vest in the ancestor or not, it matters not, for though there be an utter impossi-

^b See Watk. Desc. 240, and cases there; *Webb v. Webb*, 2 Vern. 140.

^c Ibid.; and *Roe v. Aistrop*, 2 Blac. Rep. 1228.

^d See Watk. Desc. 242.

^e Ibid. and cases there cited.

^f See *Dare v. Hopkins*, 1

Atk. 596; but see *Allen v. Nash*, 1 Bro. 127; *Seagood v. Hone*, Cro. Car. 366.

^g Co. Lit. 22, b, 319, b; and see *Godolphin v. Abingdon*, 2 Atk. 57; *Colson v. Colson*, Ibid. 247; and Doug. 506, n.

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"Heir" in the singular number.

timate limitation of the wife's estate was to the right heirs of the wife, with a proviso, that she might dispose of it "as she should think fit," it was held, to be only a new qualification of the old estate, and no alteration of it, till such new qualification should be executed¹.

But if an estate be limited to A. for life, with remainder to "the next heir male" of A. in the singular number, and words of limitation be grafted thereon, such heir shall take by purchase: the words "next heir male" being only expressive of the person who should take, or a *descriptio personæ*².

And we may observe, on this point, that, when an estate for life is limited to a person, and another is limited over to his heirs or issue, if it appear that by the words heirs or issue, was meant a certain or particular person, with relation to the time when such limitation is to take place, (as the death of the tenant for life), then such words will be words of purchase; but if the testator intended to comprehend, by such words, a class or denomination of heirs, and intended to embrace them indefinitely, then they will be words of limitation³.

So, also, if the entire use results, it will be the same; as he is then in of his ancient use. For the use follows the nature of the land from which it springs; "as the shadow follows the body." And, therefore, if a person, seised of land as heir on the part of his mother, make a feoffment, or levy a fine, *sur conusance de droit cum ceo*, &c. without

¹ *Abbot v. Burton*, 11 Mod. 181; and in 14 Vin. Heir, (W. 2.) pl. 6, p. 289.

² See *Archer's case*, 1 Co. 66; Godb. 155, pl. 207; Robinson on Gavelk. b. 1, c. 6, p. 95-97; *Goodright d. Lisle v. Pullin et al.* 2 Strange, 731; and see Harg. note (4) to Co. Lit. 8, b.

and authors there referred to; 1 Harg. Law Tracts, 505-507; and *Doe d. Long v. Laming*, 2 Burr. 1110; Fearne, 102, 294; Powell on Devises, 363.

³ See Harg. Law Tracts, 561; *Jones v. Morgan*, 1 Bro. Ch. Ca. 206.

declaring the uses to which it shall enure, the use results; and the heirs on the part of the mother shall succeed^t.

So, the resulting use of gavelkind lands shall descend to all the sons; and of lands in borough English to the youngest^u. So, a resulting use of copyhold shall follow the customary descent^x; and so also of a trust^y.

And, as the use follows the descent, so will it result according to the quantity of the estate which the grantor or grantors before had in the lands: as if there are two joint-tenants for life, with the remainder over in fee to one of them, the use will result in the same manner; and it is the same of tenant for life and the reversioner^z.

So, if the ultimate limitation of a trust be to the right heirs of the person creating it, such heirs take by descent, while such trust continues; for trusts are subject to the same rules as to descents as legal estates^a. But if such heir gain the legal estate by descent or purchase, such trust estate becomes extinct^b.

And as the ultimate limitation (or reversion) of an estate shall thus descend to the heirs of the part of that parent from whom it came, so shall its incidents: as, from the very nature of the thing, the incident shall follow, and be ruled by, its principal. If, therefore, A. be seised in fee *ex parte materna*, and make a gift for life, or in tail, reserving rent, and die without issue, the rent shall go to his

^t Co. Lit. 12, b, n. (2); 13, a, n.; *Beckwith's case*, 2 Co. 58, a. (2).

^u See Robins. Gavelk. 78, 79, b. 1, c. 5, and authors cited; and see *Fawcett v. Lowther*, 2 Ves. 300.

^x See *Fawcett v. Lowther*, *ubi sup.*; and 1 Watk. Copyh. 215.

^y Ibid.

^z *Beckwith's case*, 2 Co.

58, a; *Chudleigh's case*, 1 Co. 126, b.

^a *Banks v. Sutton*, 2 P. Wms. 713, 736; *Cowper v. Earl Cowper*, 2 Bla. Com. c. 20, p. 337; and see *Hopkins v. Hopkins*, 1 Atk. 596; *Godolphin v. Abingdon*, 2 Atk. 57; *Lord Glenorchy v. Bosville*, Ca. temp. Talb. 3.

^b See the case of *Doe* on dem. of *Balch v. Putt*, in Dougl. 771.

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heir on the part of his mother^c. So, if he had had a reversion, and a distress was afterwards granted to him and his heirs, the distress should go with the rent, as an incident to it, to his heirs *ex parte materna*^d. So, if he has a house *ex parte materna*, and one grant to him that he and his heirs shall have competent estovers to be burned in such house; these, though a new purchase, shall go with the house, as appurtenant to it, to his heirs of the part of his mother^e.

^c Co. Lit. 12, b.

^e 8 Co. 54, a.

^d 8 Co. 54, a; and Co. Lit. 12, b.

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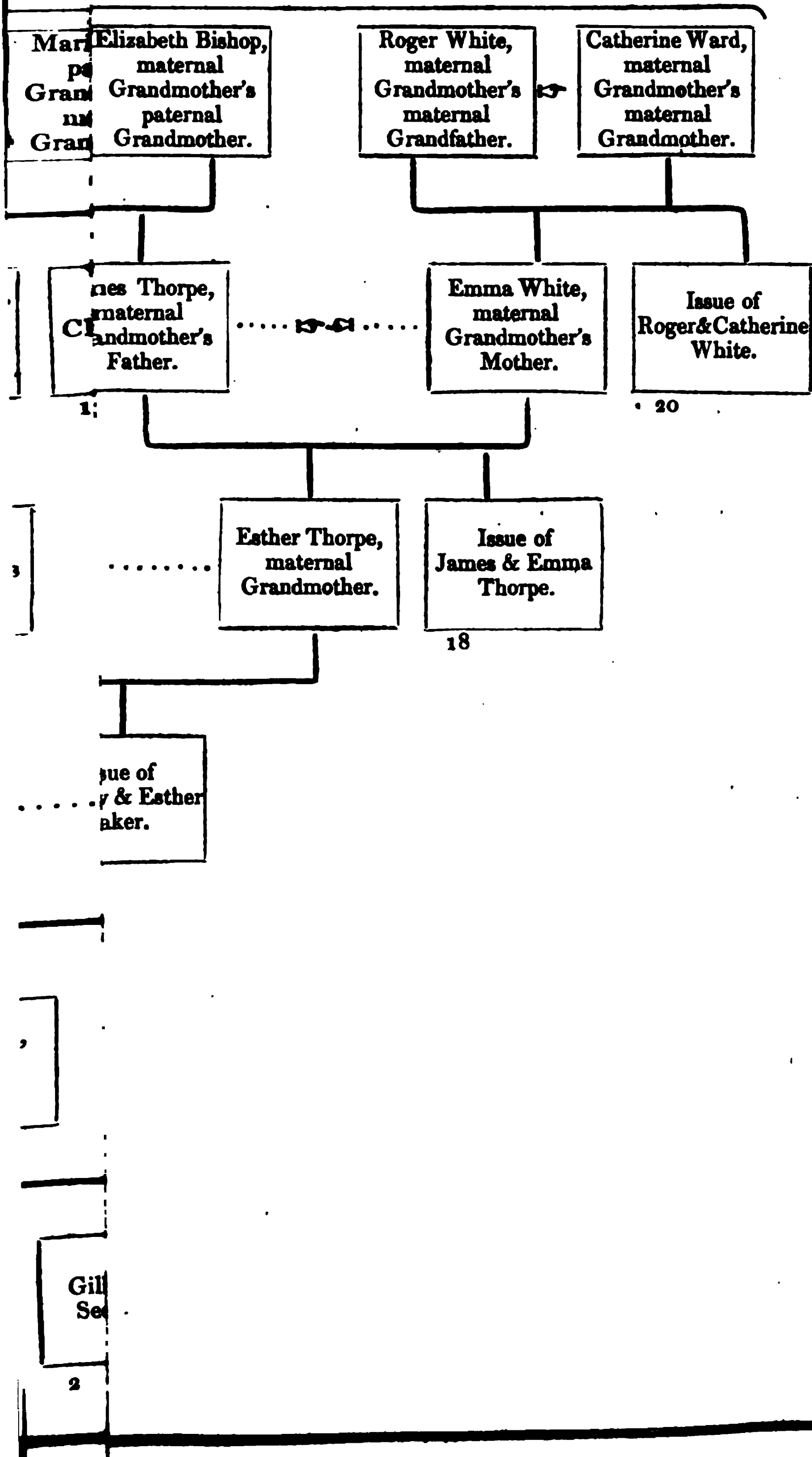
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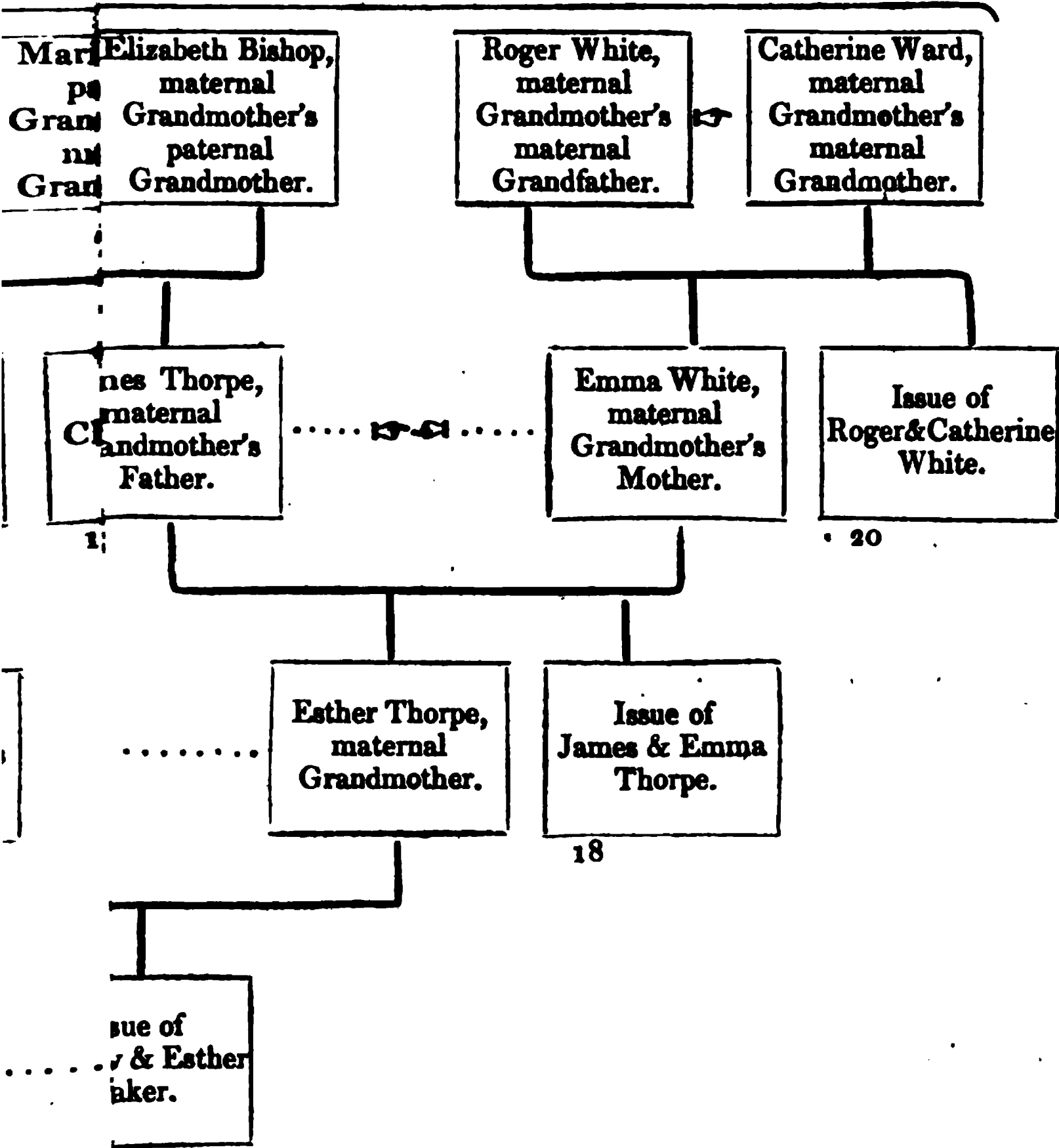
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CONVEYANCE. Where two conveyances concur, one at common law, and the other by statute, that by the common law will generally prevail, iv. 278, 282

COPARCENERS. *Of the nature of an estate in coparcenary* - - - - - iii. 472

Coparceners are by common law or by custom - ib.

Coparceners by the common law, is where lands for want of male heirs descend to daughters, sisters, aunts, cousins, or other females of equal kin to the ancestor - - - - - iii. 473

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Difference between male coparceners by custom, and female by the common law - - - - - ib. n. (2)

Coparceners make together but one heir - iii. 473

None can be coparceners at common law but females, or the heirs of females - - - - - iii. 474

The descent to coparceners is to all equally *per capita* - - - - - ib.

But on the decease of any coparcener, his parts descends by the rules of the common law, *i. e.* amongst his next of kin *per stirpes*, and with priority of males and primogenitors - ib.

If one of co-heiresses be attainted in the lifetime of the ancestor, her moiety only will descend to the innocent daughter, and the other escheat - - - - - iii. 475

But when they take *per formam doni*, as if an estate be limited to one for life, remainder to the right heirs of *A.* who are daughters, one of whom is attainted, the limitation void as to the whole - - - - - 475, n. (1)

As coparceners always take by descent, none but an estate of inheritance can be held in coparcenary - - - - - iii. 476

The incidents and properties of an estate in coparcenary - - - - - ib.

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The entry of one is in some cases the entry of all - - - - - ib.

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A rent-charge is partible - - - - - ib.

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How they are to be enjoyed by coparceners - - - - - ib.

A manor is partible. - - - - - ib.

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Partition by husband seised in right of his wife, binds the wife, if equal - - - - - ib.

Unequal partition made by the parties will not prejudice a prior lessee of either's part - - - ib.

Unequal partition cannot be amended, but must be made anew - - - - - ib

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If a charge be made by either before partition, upon a part of the land allotted to the other, it shall be held discharged - - - - - iii. 490

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One coparcener may enfeoff her companion iv. 145

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- Fine levied by a coparcener will effect a discontinuance; and if by both, it will be severance - - - - - iv. 404, 440
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Who may grant lands to be holden by copy -	iii.	20
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And that although he be seised in right of his wife only, or be an infant, non-compos, bishop, prebend, parson, queen, joint-tenant, doweress, lessee for years, executor, felon, &c. iii.		24, and notes
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Things grantable by copy, must be things of per- petuity - - - - -	ib.
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- May be *trust* estates of copyholds which are equally subservient to the rules of law applicable to freeholds - - - - - ib.
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- Free-bench is a continuation of the husband's estate, and cast upon her before admittance iii. 54
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- Free-bench of copyholds may be of the whole, a moiety, a third, a fourth, &c. of the husband's lands, according to the custom - - - - - iii. 55
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- So it may be to hold in fee for life, during widowhood, or during chastity - - - - - ib.
- Where the wife takes the whole of her husband's lands for free-bench, she may enter before admittance - - - - - ib.
- But when a part only, not till assignment by the heir - - - - - ib.
- Wife must claim her free-bench within a year and a day - - - - - iii. 56
- Title to free-bench does not accrue till death of the husband, it being only of lands of which he died seised - - - - - iii. 52
- Hence alienation by him in his life-time defeats her title, unless by special custom - - - - - ib.
- So if he surrender and die before admittance of the *cestui que use* - - - - - ib.
- So if he become bankrupt, and die, after the bargain and sale, but before admittance of vendee - - - - - iii. 53
- So of a surrender to the use of his will - - - - - ib.
- But not a devise (before the late act) without such surrender - - - - - iii. 53, p. (1)
- So forfeiture or enfranchisement - - - - - ib.
- And even an unexecuted contract for sale will exclude her - - - - - iii. 51, 54
- Widow holding free-bench during widowhood, if she sow the land, and then marry, she loses the corn - - - - - iii. 51, 56
- Settlement in lieu of wife's free-bench is a bar in equity, though a jointure of copyholds is not within 27 Hen. 8, c. 10 - - - - - iii. 52, 57

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be surrendered by her without her husband
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- An estate in, may be barred by fine and non-
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- And that as well of the lord as the tenant - - - ib.
- Devise of copyholds to wife for life, and direc-
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- Entry necessary before copyholder can surrender
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- Cestui que use of a copyhold cannot surrender till admittance - - - - - iii. 34
- Cestui que trust of copyholder may devise or release, but cannot surrender his interest - ib.
- Condition in copyholds may be released, but not surrendered - - - - - ib.
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- Feme covert may surrender copyholds with the assent of her husband, on being privately examined - - - - - iii. 36
- And that by special custom, if she be an infant - ib.
- But her husband must, in either case, assent, unless the estate be to her separate use - ib.
- Feme covert may take a surrender of copyholds to her use from her husband - - - - - iii. 37
- Except she be the wife of the lord of the manor ib.
- Covenant to surrender copyholds not equipotent with an actual surrender - - - - - iii. 40
- Contingent use of copyholds need not be named, so that the person to take be sufficiently described - - - - - ib.
- There may be a *possessio fratris* of, before admittance - - - - - iv. 307
- Surrender and admission of copyholds will not give a new estate to alter the descent - iv. 373
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- Devise takes effect under surrender, by virtue of the devise, as a declaration of the uses thereof v. 56, 64
- Whether legal or equitable, not affected by statute of frauds - - - - - iv. 125, 126
- Copyholder cannot levy a fine of his copyhold iv. 436, 471
- Unless he previously acquire the freehold by feoffment, &c. - - - - - ib.
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May grant leases for one year, but no longer, without license - - - - ii. 370; iii. 57

But may secure a longer enjoyment by covenant - - - - - ii. 370

Agreement to grant a lease for a longer period, no forfeiture - - - - - ii. 376

Cannot grant lease in reversion - - - - ii. 375

Cannot grant lease for life even by license, that being a freehold interest - - - - iii. 58

Lease made of copyholds, under license, by tenant in tail, will not bind the issue - - - ib.

Lease under a license may be assigned at pleasure - - - - - iii. 146

The following customs have been held to be *good*, viz :—

Custom to pay a fine for license to alien, iii. 58, 63

To demise, paying a year's rent on death or assignment - - - - - ib.

That lease for one year shall be void against the heir - - - - - ib.

That lord shall license to lease for 99 years, on paying 10 years rent - - - - - ib.

That executors shall hold a year after copyholder's death - - - - - ib.

That a surrender must be made in person - - - ib.

That if copyholder do not repair, lord may distress upon him, or his under-tenant - - - ib.

But copyholder for life may name his successor - - - - - ib.

That copyholder for life may cut down trees - - - ib.

That the steward shall make bye-laws to order the common - - - - - ib.

That copyholder shall be excused from attendance at court on paying a small fine - - - ib.

That if copyholder sell, he shall give refusal to his next of blood, or to his next neighbour, iii. 65

- That copyholder may have common in the lord's soil - - - - - iii. 66
- That copyholder may dig the lord's turf for fuel, or marl for compost - - - - - ib.
- That lord may take the profits of infants lands during their minority - - - - - ib.
- That mortgages shall not be presented till the third court - - - - - ib.
- The following customs have been held to be void:—
- That lessee shall hold half a year after term expires - - - - - ib.
- That, on death of copyholder for life, lord shall admit his son, and if no son, a daughter - - - - - ib.
- That copyholder shall not put in his beasts till after the lord - - - - - ib.
- That tenant shall pay a fine on the marriage of his daughter - - - - - ib.
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- What acts of parliament extend to copyholds* - iii. 166
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- 32 Hen. 8, c. 32, and surrenderee of a reversion of copyholds enabled to enter for condition broken - - - - - iii. 167
- 20 Hen. 3, giving writ of dower - - - - - iii. 169

32 Hen. 8, c. 28, giving <i>curia in vita</i>	-	iii.	169
32 Hen. 8, c. 9, against champarty	-	-	ib.
5 Eliz. c. 14, respecting the forging of charters		iii.	170
The statutes concerning bankruptcy	-	-	ib.
4 Hen. 7, c. 24, respecting fines	-	-	ib.
7 Anne, c. 19, enabling infant trustees to convey	-	iii.	171
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27 Eliz. c. 4, concerning fraudulent conveyances	-	iii.	172
29 Car. 2, c. 3, requiring declarations of trusts to be in writing	-	-	ib.
4 Geo. 2, c. 28, of distress for rent	-	iii.	171
12 Car. 2, c. 24, allowing appointment of guardian by will, extends to copyholds as against guardian in socage, but not as against the lord	-	iii.	172
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Copyholds not within the following statutes :—

32 Hen. 8, c. 28, respecting discontinuance by husband of wife's lands	-	iii.	167
Quære, whether within that part of the same statute which concerns leases made by husband and wife, tenants in tail, and ecclesiastical persons	-	iii.	168, n. (1)
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11 Hen. 7, c. 20, vacating alienations of wife's lands holden in dower, &c.	-	iv.	571
Statute of uses, 27 Hen. 8, c. 10, nor within the same statute making jointure a dower	-		ib.
Statutes Hen. 8, Will. 3, and 7 Anne, giving writ of partition between co-tenants	-	iii.	170
Stat. West. 2, giving <i>elegit</i>	-	-	ib.
17 Edw. 2, c. 10, respecting the wardship of idiots	-	iii.	171
14 Geo. 2, c. 20, relating to estates <i>pur autre vie</i>	-	-	ib.
32 Hen. 3, c. 37, giving distress to executors,			ib.

- Stat. Westm. authorizing suitors to appoint attornies - - - - - iii. 171
- 52 Hen. 3, c. 9; 6 Edw. 1, stat. 1, c. 12; nor 11 Edw. 1, *de mercatoribus* - - - - - ib.
- The statutes of wills, 32 Hen. 8, 34 Hen. 8, 29 Car. 2. - - - - - ib.
- 13 Eliz. c. 4, making lands of accountants liable to debts to the crown - - - - - iii. 172
- The means by which the copyhold interest may be suspended or destroyed* - - - - - iii. 174
- Will be extinguished by the freehold and copyhold interest uniting in the same person in the same right - - - - - iii. 174, 178
- So by the copyholder's releasing or surrendering to the lord - - - - - ib.
- So by any other act showing an intent to give up the copyhold - - - - - iii. 175, 176, 178
- Copyholder joining with the lord in a feoffment is extinguishment - - - - - iii. 176
- Accepting a feoffment or other conveyance of the freehold - - - - - iii. 177
- And such acceptance by tenant in tail of a copyhold bars the intail - - - - - ib.
- Also copyholder in fee, accepting lease for years of the lord, or his lessee is an extinguishment - - - - - iii. 176
- But quære, if he take a lease for years of the manor - - - - - ib.
- A copyholder's intermarrying with the lady of the manor suspends the copyhold - - - - - iii. 178
- So copyholder taking the manor in execution - - - - - ib.
- Copyhold not destroyed by husband seised of manor in right of his wife, granting common law interests - - - - - iii. 178
- Copyhold extinguished by the accession of the crown to the copyhold - - - - - ib.
- Copyhold not extinguished by severance of the inheritance of the land from the manor by the lord - - - - - ib.
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- Difference where the inheritance of one, and where of many copyholds is granted - - - - - iii. 179

- Of extinguishment of copyhold incidents, as
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 and - - - - - iii. 179, 180
- Of *forfeiture* of copyholds - - - iii. 182
- Copyholds subject to like forfeitures for treason,
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- And by custom the forfeiture accrues by convic-
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- Pardon after attainder, no discharge of forfeiture
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- Refusing to appear in court when personally sum-
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- Alienation of a common law interest by a copy-
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- Bargain and sale, though enrolled, no forfeiture
 - - - - - iii. 188
- Surrender in fee no forfeiture - - - - - ib.
- Quære, whether a recovery by tenant for life will
 be a forfeiture ; seems not - - - iii. 189, n.(1)
- Lease for more years than one, without license,
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- Lease for one year, and then for another year, &c.
 a forfeiture - - - - - ib.

- But not a covenant that the lessee shall so enjoy
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- Waste, whether active or permissive, a forfeiture
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- So altering the nature of the lands from arable
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- Inclosing copyholds is a forfeiture - - - iii. 195
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- And these expressions not controlled by the previous devise of an express estate for life - ib.
- Devise of an estate of freehold to the devisee with remainder to his right heirs - - - ii. 43
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- Devise to one and his "heirs male," or "heir male,"—a tail - - - - - ii. 80
- To a man and "his seed"—a tail - - - ii. 81
- To one, and "if he die before issue," or "not having issue," or "not having a son"—tail, ii. 82
- To a man, "and the heirs of his body for a thousand years"—a chattel, and not tail - - - ib.
- To testator's son, and the heirs male of his body for a term of years, proviso, that if he or his issue alien, then over—tail - - - - - ib.
- To son, "and if he have issue of his body begotten," then to such issue, but if none, then over—tail - - - - - ib.

- Devise of certain lands to one son and his heirs,
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“proviso the survivor shall be heir to the
other, if he die without issue”—each tenant
in tail of his own lands, remainder to survivor
in fee - - - - - ii. 82, 83
- To “son for ever, remainder to his heir male for
ever,” then over—tail - - - - - ii. 83
- To son, after death of his mother; and, if daugh-
ter outlive the mother and brother, and his
heirs, to them—tail in son - - - - - ib.
- To wife for life, remainder to three daughters,
equally to be divided; and if any die before
the other, survivors to be her heirs; and if all
die without issue, then over—tail - - - - - ib.
- To a man “and his heirs, and if he dies without
issue,” then over—tail - - - - - ib.
- To “wife for life, then to her son, and if he die
without issue, having no son,” then over,—tail
male - - - - - ii. 82, 83
- To son “and the heirs of his body,” after death
of his mother, and if he die before his mother,
then over—tail, though he die before his
mother - - - - - ii. 83
- To “wife, if she do not marry;” but if she do,
then his son to enter immediately upon her
decease, and to hold to him and the heirs of
his body—tail in son, though the wife do not
marry - - - - - ib.
- Devise of three houses to wife, remainder one
house to each of testator’s children and his
heirs, and if any of his said issue die without
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—life to survivors on death of either (qu.) ii. 84
- To “son, and if daughter survive son and his
heirs,” then to her—tail in son - - - - - ib.
- To son, “and if J. S. (a stranger) survive son and
his heirs, then to J. S.”—the fee-simple in
son - - - - - ii. 85
- To a “son for life, and his heirs, and for want of
heirs of him, to another son” in the same man-
ner, “and for want of heirs of him, to D.”
(their next cousin and heir) and his heirs—tail
in sons - - - - - ib.

- To a "son for life, remainder to another son and his heirs for ever, proviso if such son die without heirs, then to testator's daughters"—tail in second son - - - - - ii. 85, 86
- To "second son and his heirs for ever, and, in default of heirs, to testator's own right heirs"—tail in son - - - - - ii. 86
- To a "son and his heirs, and if he die without heirs, then to his half brother, or "one and his heirs, and if he die without issue, then to a charity," or other not inheritable to the first devisee—a fee-simple in first devisee ii. 86, n. (1)
- To one "for life, and if he die without issue," to another—tail - - - - - ii. 87
- To one "for life, remainder to next heir male," default of such heir, then over—tail in first devisee - - - - - ib.
- To one for life, "remainder to his first heir male, and the heirs male of the body of such heir male"—life in first devisee - - - - - ii. 87, n. (1)
- To "a man and his wife, and, after their death, to their children," (they having children at the time)—is life estate in husband and wife, remainder to children for life - - - - - ib.
- To "a man and his children," or "his issue," (he then having issue)—the devisees are joint-tenants - - - - - ib.
- To "a man and his children," or "issue," (he not then having issue)—tail in the devisee - - - - - ib.
- To a man "for life, remainder to the heir or heirs of his body"—tail - - - - - ii. 88
- To one son for life, after his decease to the issue of his body begotten on a second wife, (he having a first wife then living,) default of such issue, to another son in fee—tail in first son - - - - - ii. 88, 89
- To "nephew for life, and the heirs male of his body begotten, but for want of such issue, to said nephew for his life, and no longer," remainder over—tail to nephew - - - - - ii. 89, 90
- To grandson "and the heirs of his body begotten, and their heirs for ever;" proviso, if he die without leaving issue of his body, then over, chargeable with a legacy—tail in grandson - - - - - ii. 90

- To daughter, "to hold (after the death of her mother) to her and the heirs of her body," proviso, if she die without issue living at her decease, then the estate should be void as to the inheritance—tail - - - - ii. 91
- To son, "to the intent he shall not dispose of said estate for longer time than his life, and to that intent, to said son for life, remainder to trustee and his heirs for life of said son, remainder to heirs of body of said son," remainder over—tail - ii. 91, 92, *sed vide* ib. n. (1)
- To one "for life, with directions to trustees to settle said estate on the issue of his marriage, but if he die without issue of his body, then over—tail - - - - - ii. 92
- To one "for life and no longer," remainder to such son as he should have, default of such issue," over—tail - - - - - ib.
- To S. D. son of C. D. for life, and the heirs male of his body, default of such issue, to other sons of S. D. by name—tail in an after-born son not named - - - - - ii. 93
- To "second son of R. B. for life, remainder to the first son of the body of such second son, and to the heirs male of his body,—tail in second son - - - - - ii. 94
- To one "for life, and, after his decease, to and amongst his issue"—tail - - - - - ib.
- Devise of legal and equitable or trust estate to one "for life, remainder to first son or issue male of his body, and to the heirs male of such son"—tail of the legal estate - - - - ii. 95
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- To trustees in trust to convey to daughter for life, remainder to the heirs of her body—life in daughter - - - - (qu.) - - - - 98
- Devise of lands to be settled on nephew for life, remainder on heirs male of his body and their heirs male—tail - - - - - 99
- In trust for B. for life, remainder in trust for the heirs male of his body—tail - - - - 100
- Trust to pay rents to B. for life, after to pay the same to the heirs of his body—tail - - - - ib.

- To trustees "to the use of *T. R.* for life, remainder to trustees to preserve, &c. remainder to use of heirs male of *T. R.*" proviso if devisee should not conform to certain proviso, said premises should go over—tail - - ii. 101
- To trustees in trust for *P.* "for life, remainder to trustees to preserve, &c. remainder to the heirs of the body of *P.*"—tail - - ii. 102
- To trustees "to use of his son for life, remainder to the use of the heirs male of the body of his said son—tail - - - - - ib.
- To one "for life, remainder to the *next heir male* of his body—tail - - - - - ii. 103
- To one "for life, remainder to the heirs male of his body, and his heirs, and in default of such heir male," over—tail - - - - - ib.
- To one "for life, then to the heirs of his body and their heirs, and in default of such heir," over—tail - - - - - ii. 104
- To one for life and after to the first heir male of his body—tail - - - - - ii. 105
- To "one and the first heir male of his body and the heirs male of his body—tail - - - ii. 105
- To father "for life, and after to his *next heir male*, and to the heirs male of such *next heir male*,"—life in father, and tail in next heir male ii. 104
- To *C.* "for life, remainder to trustees to preserve, remainder to the heirs of the body of *C.*"—life in *C.* tail in heirs of his body - - - ii. 106
- To one and the heirs of his body, and then to trustees to preserve remainders during his life, or failure of issue—over - - - - - ii. 108
- To son for life, remainder to trustees during his life to preserve, remainder to the heirs of the body of his said son"—life in son - - - 112
- To *A.* "for life, to trustees to preserve to heirs of his body"—life in *A.* remainder to himself in tail - - - - - ii. 109
- To one "for life, remainder to issue male of his body, and the heirs male of the body of such issue male, default of issue, remainder over—tail - - - - - ii. 107

- To daughter for life, after her death to her issue ;
default of issue, to be at her disposal—tail, with
contingent fee - - - - - ii. 103
- To one for life, remainder to the issue male of
his body and to their heirs—tail - - - ii. 109
- To one and the issue of his body living at his
death, for want of such issue over—tail - ib.
- To one and his sons in tail male, and in failure
of such issue, reversion to testator's heirs—
tail - - - - - ii. 110
- To trustees in trust to pay rent, &c. to daughter,
for life, remainder to the use of the heirs of
her body, default of issue over—tail - - ib.
- To *S.* for life, remainder to his son *T.* and his
heirs male for ever—life in *S.*, tail in *T.* - ii. 112
- To son and the heirs of his body, and if he die
without leaving issue, over—tail - - - ib.
- To one “for life without impeachment of waste,
and to his issue male and his heirs for ever,”
and in case he die without issue, remainder
over—life estate - - - - - ii. 127
- To wife, and if she have issue, to such issue at
21, and in default of issue to name two persons
to sell the same to her best advantage—life in
wife - - - - - ii. 128
- To “son to enjoy the rents for life, power to make
jointure, remainder to the heirs male of his
body during his life, default of such issue”
over—life - - - - - ib.
- To “*B.* and his heirs lawfully begotten, viz. to
his first and other sons, and the heirs of their
bodies”—life in *B.* - - - - - ib.
- To *A.* (of gavelkind lands) and the heirs of her
body, as well females as males, and to their
heirs and assigns as tenants in common—life
in *A.* - - - - - ii. 129
- To daughters *E.* and *S.* “as tenants in common,
equally to be divided, viz. one moiety to *E.*
and her heirs, and the other to *S.* for life, and
after her decease, to the issue of her body and
their heirs—life in *S.* - - - - - ii. 130
- To trustees in trust for *B.* “for life, and to his
first and other sons in tail,” but if he die
“without an heir male of his body,” over—
life - - - - - ib.

- To daughter *D.* "for life, and after her death to her first son and the heir of her body," default of such heirs to *N.* but *D.* not to alien, but lands to be to her heirs male, and for want of such issue to *N.*—life - - - ii. 130
- To daughter "*M.* for life, remainder to trustees to preserve, remainder to first and other sons in tail, but if daughter should die without issue of her body living at her decease," then over—life in daughter - - - - - ii. 131
- To *A.* for life, remainder to trustees to preserve, remainder to first and other sons in tail, remainder to "daughters as tenants in common"—life in daughters - - - - - ii. 132
- To trustees "to settle to *H.* and the heirs of his body, default of such issue," over, so that *H.* should not dock the entail—life in *H.* - - - ii. 133
- To trustees "to convey to daughter for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body," remainder over—life in daughter - - - ib.
- To trustees "to convey to daughter for life, independently of her husband, after her death to heirs of her body"—life - - - - - ii. 134
- To trustees, "to sell and purchase other lands to be settled so as to permit *E.* to receive the rents for life, after his decease to the use of the issue of his body"—life - - - - - ib.
- To trustees, "to the use of *B.* for life without impeachment of waste, remainder to trustees, to preserve, &c. after his death to the use of the heirs of the body of *B.*"—life - - - - - ii. 135
- To trustees of money to be invested in land to be conveyed to *A.* "for life, and then to the issue of his body, default of issue," over—life - - - - - ii. 136
- To trustees "of money to be laid out in lands to be settled by advice of counsel, to use of *P.* and the heirs of his body by succession and priority, default of such issue, over"—life in *P.* - - - - - ii. 137
- Devise to *B.* "for life only, without impeachment of waste, remainder to the issue of his body, and to the heirs of the body of such issue"—life - - - - - ii. 140

- To son for life without impeachment of waste, remainder to trustees to preserve, &c. remainder to the heirs of the body of the son, power to jointure—life - - - ii. 146
- To trustees for *B.* and his first and other sons in tail, without impeachment of waste, remainder over—life in *B.* - - - - - ib.
- To persons and their heirs—they take as joint-tenants - - - - - iii. 419
- To three as joint-tenants, and the survivors and survivor, and the heirs of the survivor—a joint-tenancy in fee - - - - - iii. 453
- Devise will in some cases operate as a lease ii. 393
- Is a breach of a condition not to alien - iii. 266
- Devise no severance of a joint-tenancy, iii. 461, n.(1), 465, n.(1), 470
- To executors or trustees for payment of debts or portions generally, gives them a power to sell or mortgage - - - - - v. 99
- But otherwise where a different mode of raising the money is declared or implied - - - - - ib.
- In what cases estates in mortgage to devisor will pass by his will - - - - - v. 101
- Quære*, whether a devise by mortgagee of lands mortgaged to him, must be executed conformably to the statute of frauds - - - - - ib.
- To trustees in trust to pay over the rents and profits, or to convey or to sell, vests the legal estate in the trustees - - - - - iii. 570
- See *Limitation*.
- To trustees to permit feme covert to receive the rents, &c. for her own use—legal estate in the trustees - - - - - iii. 571
- Of rents and profits to wife, to be paid by the executors.—*Quære* whether legal estate in the executors - - - - - ib.
- To trustees to pay surplus of rents, &c. to feme covert for life, remainder to heirs of her body—legal estate in trustees, and not executed in her - - - - - iii. 572
- But otherwise of a devise to trustees in trust to permit *A.* to receive the rents, &c. for life, remainder to stand seised to the use of the heirs of his body—the estate is executed in *A.* iii. 573

To trustees, in trust, after payment of taxes, &c. to pay over the surplus of rents, &c. to C. S. for life, and then to the use of the heirs of his body—legal estate in trustees, and not executed in C. S. - - - - - iii. 574, 575

To trustees to receive rents, and apply them for maintenance of J. S. for life, remainder to the heirs of J. S.—legal estate in trustees, and not executed in J. S. - - - - - ib.

Of lands to executors, in trust to be sold, gives them an interest - - - - - ib.

But otherwise of a devise that executors shall sell, this being a bare authority - - - - - ib.

In the first of these cases, if one executor die, the trust may be executed by the survivor, but in the latter not - - - - - iii. 574, 575

But chancery will compel the heir at law of the testator to join - - - - - iii. 575

To A. for life, and after his decease to be sold by his executors; *quære*, whether the executors may sell the reversion in A.'s life-time - - - - - ib.

To executors, for payment of debts and until debts paid, gives them a chattel interest only in the land, and not a freehold - - - - - v. 577

¶ (¹) To I. C. and the issue of his body living at his death, in default of such issue, over: tail in I. C.—1 Ca. Op. 320.

¶ To I. S. and his *heirs for ever*, but if said I. S. die without issue of his body living at his death, then to I. N. and his heirs; fee simple in I. S. but *conditioned* to go over on failure of issue.—1 Ca. Op. 315; vide *Fearne's Post. Works*, 176.

¶ To I. S. and the *heirs of his body*, but if said I. S. die without such heirs living at his death, then to I. N.; estate-tail *absolute* in I. S.—1 Ca. Op. 315.

¶ To a man for life, remainder to his issue; tail in the devisee.—2 Ca. Op. 279.

(¹) The limitations, &c. thus marked (¶), are not inserted in the work, because not adjudications; but their authority is sufficiently respectable for the student's attention.

- ¶ To a person for his "sole use and benefit," gives a fee.—*Per Fearn*; *vide* P. Wks. 140.
- ¶ Of freehold estates to a man, his "executors, administrators and assigns," gives a fee.—F. P. Wks. 144.
- ¶ Of real estates, in trust to permit *A. B.* to take the rents, &c. for life, then in trust to permit his issue to take the same as tenants in common, gives estate for *life* only to *A. B.*—F. P. Wks. 154.
- ¶ Devise over of chattel or personal property, on a general failure of issue of the first devisee, is void; but if the limitation over be confined expressly, or by implication, to the dying without issue "*living at his decease*," or without issue which shall attain twenty-one, it is good.—F. P. Wks. 161.
- ¶ Of freehold land to "executors," *as such*, for payment of debts, &c. is a chattel interest.—F. P. Wks. 169.
- ¶ To *G.* for life, remainder "to the issue of his body and their heirs for ever;" in case he die without leaving issue, over: life in *G.* remainder to his issue in fee.—F. P. Wks. 178.
- ¶ To *C.* and *D.* his wife, for life, remainder to their children as tenants in common, and their heirs, and in default of such issue, to survivor of *C.* and *D.*; life to *C.* and *D.* contingent remainder in fee to children.—F. P. Wks. 185.—*N.* testator, had a child living when will made.
- ¶ To *B.* (of lands,) his heirs and assigns for ever, "when he arrives at the age of twenty-one," does not vest till that age, unless there is an intermediate disposition of the estate, or of the rents and profits.—F. P. Wks. 191.
- ¶ Devise to *A.* and his heirs lawfully begotten, an estate-tail.—F. P. Wks. 174.
- ¶ To *B.* his heirs and assigns for ever, but in case he die without leaving issue of his body begotten, then over; tail in *B.*—F. P. Wks. 176; *Ib.* 133; *sed vide* 1 Ca. Op. 315.
- ¶ In trust for the first son of *D.* "when he shall attain twenty-one," for life, remainder to the

first and other sons of such sons in tail, vests in such first son of *D.* (if born in testator's life-time) immediately.—F. P. Wks. 212.

Devise of leaseholds to *D.* but "if *D.* die without having child or children," then to *B.*; *D.* had a child, who died in her life-time; held *D.* took the estate absolutely - ii. 82, 130

To trustees till *A.* attain twenty-four, and then to him in fee, gives him the fee, though he die before that age - - - - - ib.

To trustees, in trust to pay rents and profits to *A.* a feme covert, for life, for her separate use; *A.* takes an equitable estate for life, and may make an equitable tenant to *præcipe* - ib.

To *B.* for life, then to child and children living at his death; posthumous child takes equally with the rest - - - - - ii. 83, 136

To executor, in trust to pay debts and legacies, residue to himself; only a charge, and heir entitled to surplus of the real estate - - - ii. 137

To *A.* and her heirs, but if she die under twenty-one and unmarried, then over; *A.* died in life-time of testator under twenty one, but married; heir entitled - - - - - ib.

To *T.* and his heirs, and if he die and leave no issue, then to *E.*; a good executory devise to *E.* - - - - - ib.

To such son of *B.* as should be in holy orders; if no such son, to *C.*; devise to *B.* void, as being on too remote a contingency, and heir at law of devisor takes, and not *C.* - ii. 85, 137

To *S.* her heirs and assigns for ever, but if she die without leaving issue of her body at her death, then to *F. B.*; *S.* takes a fee simple, and executory devise to *F. B.* good - - - ii. 138

Vide post, 612, mss.

Devise to *G.* for life, remainder to *C.* his heirs and assigns, in case she outlive *G.*, but if not, then to *G.* his heirs and assigns; *C.*'s estate a contingent remainder, and barred by *G.*'s recovery, ii. 140

Of "all my lands, tenements and hereditaments to *A.*" gives a fee, unless contrary intent appear - - - - - ii. 42, 141

"Of all the rest I have in the world, both houses, lands, &c." to my wife, my executrix, so that she pay therewith debts, &c.; a fee in the executrix - - - - - ii. 141

Distinction as to carrying the fee where the debts are simply a charge on the *estate devised*, and where a charge on the *devisee* in respect of such estate. In the latter case a fee passes, in the former not - - - - - ib.

"I give my freehold house and furniture to *A.* my executrix, *she paying all my debts and legacies*," passes a fee to *A.* - - - - - ii. 40, 143

Devise to such uses as *A.* shall appoint, gives a fee to *A.* - - - - - ib.

Devise in fee, in trust for *A.* and *B.*; the *cestui que trusts* take a fee - - - - - ib.

Devise commencing with intention to dispose of "all the" testator's "worldly estate," provides for heir at law, and gives "all the rest of my goods, chattels, rights, credits, personal and *testamentary estate*" to *B.* for his own use; *B.* takes a fee in the *lands* of testator - - - - - ii. 145

Devise to *A.* after the death of *B.* is life estate in *A.* by implication, if *A.* be heir at law, otherwise not - - - - - ib.

Devise to one for life, remainder to trustees and their heirs to preserve, &c. remainder to others for life, remainder to trustees as before, remainder over; remainder-men take legal estates - - - - - ib.

Devise to wife for life, and if *B.* one of testator's sons, should pay her a certain sum, he to share equally with his brothers and sisters, *C. D. &c.* if either of them die, his or her share to go to the survivors; children take only life estate, ii. 87, 146

Devisor, after "touching my worldly and personal estate," gave life estate in *A.* and *B.* to his wife; and devised all his lands, freehold, copyhold and leasehold, in *A.* to *I. W.*; also all his estates freehold and copyhold in *D.*: *I. W.* has only life estate - - - - - ib.

I devise all my messuages, lands and hereditaments to *A.*; life in *A.* - - - - - ib.

"To *A.* and the issue of his body, his, her and their heirs equally to be divided; if no such

issue, over." *Quære*, whether *A.* has a life or
a tail estate - - - - - ii. 88

To a trustee, to receive and pay over rents of the
estate for maintenance of *A.* a feme covert,
and the issue of her body for life, remainder
for the use of the heirs of her body, default of
such issue to testator's heirs; *A.* took estate
for *life* only - - - - - ib.

To *A.* to hold as an inheritance to her and her
children or issue for ever, and in default of
children, over; tail in *A.* - - - - - ii. 89

To *A.* for life, remainder to trustees to preserve,
remainder to the heirs male of the body of *A.*;
the elder of "*such sons*" and his heirs male to be
preferred; default of such issue, to the "*daugh-
ters*" as tenants in common: *A.* takes *life estate*
only; the words "*sons*" and "*daughters*" ex-
"plaining *heirs male of his body*" to mean first
other sons - - - - - ib.

Devise of "all my copyholds at *B.*" to, &c. gives
a life estate only - - - - - ii. 90, 146

Of personal property to *A.* for life, remainder to
her children when of the age of twenty-seven; if
she leave no children, or all die before that age,
over; void as too remote - - - - - ii. 140, 145

Of a term or trust of a term for any number of
lives in being successively; good - - - - - ib.

Of leasehold property in remainder, in trust for
infant *in ventre*, &c. if a son, for life, remainder
to such of his issue as should be his heir at law;
if no such issue living at his death, or if such
infant not a son, remainder over; *not* too re-
mote - - - - - ib.

Of lands to trustees in fee, in trust for *A.* for
ninety-nine years, if so long live; remainder to
his first and other sons, and the issue male
of their bodies for a like term; default of such
issue male, to *B.* for like term, and his issue
male; default of such issue to right heirs of
devisor: the limitation over after that to the *first*
son of *A.* void - - - - - ib.

Devise to *A.* and *B.* and their heirs, provided
that if they both have issue, the dividends of
both to go to their issue; default of issue in
both, over: tail in *A. B.* - - - - - ii. 98

- Devise in fee to pay debts, then to use of *A.* in trust for *B.* for life, remainder to heirs male of his body; tail in *B.* - - - - - ii. 100
- To *A.* and the heirs of his body as tenants in common; if *A.* die before twenty-one, or without leaving issue of his body, then over; *A.* takes an estate tail - - - - - ib.
- To such male issue as *B.* shall have when *A.* attains twenty-one; a son of *B.* dying before *A.* attains twenty-one, takes nothing - - - - - ib.
- To *A.* for life, remainder to the issue male of his body, and the heir of such issue; estate tail in *A.* - - - - - ii. 101
- To *A.* for life, remainder to his issue in tail; *A.* may, before issue born, bar this remainder, and all subsequent remainders *contingent* - - - - - ib.
- To *A.* for life, remainder to his eldest son and his heirs, and in default of "issue male of *A.*," over; *A.* takes estate for life, remainder to his eldest son in tail, remainder to himself in tail, ii. 102
- To *A.* and her heirs, and if she die without issue she to dispose of it; default of issue and disposition, to *B.*; estate tail in *A.* - - - - - ii. 103
- To *C.* for life *only*, remainder to the issue of his body as tenants in common, remainder to *R.* in fee; estate tail in *C.* - - - - - ii. 104
- To *A.* for life, without waste, and power to jointure, remainder to the issue male of his body and their heirs, default of issue, over; tail in *A.* - - - - - ii. 105
- To testator's first son on his wife to be begotten for life, remainder to trustees to preserve, &c. remainder to the heirs male of such son; tail in first son - - - - - ib.
- ¶ Devise to *A.* and his children; *A.* and the children, if there be any, take a joint estate for life; if none, *A.* takes an estate tail.—1 Ca. Op. 361.
- ¶ Devise to *A.* in tail male, subject to the payment of 10,000*l.* to the daughters of *A.* if any living at his death. *Quære*, whether this charge can be barred by recovery of *A.*.—2 Ca. Op. 130.
- ¶ To *A.* for life, and until *B.* shall attain twenty-one and then to *B.* his heirs and assigns; *B.* died

under twenty-one: this a vested legacy, and goes to his heirs.—2 Ca. Op. 137.

¶ To two sons, one being heir at law of testator, as tenants in common; the heir takes the moiety by descent.—F. P. Wks. 128.

¶ But if the devise be to them generally or expressly as joint tenants, the heir takes by the will.—F. P. Wks. 128.

¶ So if devise be to two co-heirs, whether in joint tenancy or in common, they take under the will.—F. P. Wks. 128.

¶ To *B.* and his heirs for ever, but if he die without heirs, then to *C.* &c. (being collateral heirs to *B.*) is estate tail to *B.*—F. P. Wks. 133–176, *et vide* 178.

To *A.* and the heirs of her body as tenants in common, is an estate tail in *A.* - - - ii. 107

To *D.* testator's eldest son for life, remainder to trustees, &c. remainder to the first and other sons of his said son, remainder to second son of said eldest son, &c.: the sons of *D.* take vested estates tail in succession, and the remainders over are not contingent - - - ii. 108

If devise of land be void for uncertainty, the heir at law takes - - - - - ib.

So if void by lapse; and it will not go to residuary devisee - - - - - ib.

¶ Devise of freehold lands upon such trusts, &c. as deviser should afterwards by any instrument, &c. appoint, void.—F. P. Wks. 435.

¶ But *quære* otherwise of copyholds or chattel interests.—Ib. 437.

Devise will pass an estate contracted for, ii. 6; v. 63

If estate contracted for be devised, and title prove defective, devisee not entitled to any equivalent; nor heir at law entitled to insist upon having it - - - - - ib.

Devisee of real estate not more favoured than legatee of personal - - - - - ib.

Devise *subject to payment of debts*, passes a fee, unless a contrary intent shown - ii. 42; v. 99

Devise to trustees will not carry the fee by implication, if the purposes of the trust may be answered by a less estate passing to them - iii. 611

Devise to *A.* in tail, with remainders over; proviso, that the devise shall be void on a certain event, as if *A.* were dead without issue: on the happening of the event, the remainder-man takes, ii. 110

Devise to trustees, to be applied to such purposes as they and the minister of a methodist congregation should think fit, not a charitable use, iii. 596

Words may be supplied in a will to make the sentence complete, and answer the testator's intent - - - - - v. 101

Devise of farm in testator's own occupation to wife for life, and also to her of "all his goods, chattels and movables," passes corn growing at testator's death, and not reaped till after death of wife - - - - - v. 57

Devise to *A.* and the heirs of his body; in default of such heirs, over: tail in *A.*, and limitation over, void, as too remote - - - ii. 109; v. 117

But in default of *leaving* such heirs, over, good - ib.

Devise in trust to pay produce to *A.* for life, remainder in default of issue to *B.*; remainder to *B.* void, as too remote - - - iii. 611

Bequest to all the children of *A.* to be paid at twenty-one or marriage; survivorship and maintenance vests on eldest attaining twenty-one, to exclusion of children born afterwards v. 82

Otherwise of a marriage settlement - - - ib.

Devise of testator's real and copyhold estates in general terms to a child passes unsurrendered as well as surrendered copyholds - - - v. 55

After-purchased lands will not pass by the will v. 65

The rule that after-purchased lands do not pass is not from the word "having" in the statute, ib.

Copyholds purchased after the will passed by will containing words which comprised them, and they were surrendered to uses declared or to be declared by testator's will - - - v. 68

- Devise of all *freehold* lands held to pass leases for lives, though the limitations under the devise were inapplicable to such leases - - v. 69
- How a devise may fail to take effect* - - v. 158
- May fail of effect from various circumstances appearing on the face of the instrument, or existing *dehors* the instrument - - v. 158
- May fail by *uncertainty* or *repugnancy* on the face of the will - - - - v. 159, 161
- If the thing devised clearly described, will not fail for error in words of demonstration - v. 161
- May be void for repugnancy; as if it contains provisos repugnant to what has been before directed - - - - v. 162
- Or void because the devisor's intent is not agreeable to the rules of law - - - v. 184
- Because the devisor's instructions not followed - ib.
- If it does no more than what the law would effect without it - - - - v. 184, 191
- Of an estate for life, to the heir at law, void; for the fee-simple descending, drowns the estate for life - - - - v. 186, 188
- Of an estate to the heir at law, *charged* with money to be paid, will not take it out of the above rule - - - - v. 188, 189
- Though to take by the devise is most beneficial for the heir - - - - v. 189, 192
- To daughters alters the descent, and consequently operates to give them an estate by purchase, v. 191
- Of borough-English lands to sons, alters the descent, and they take by purchase by the devise - - - - v. 192
- So of gavelkind lands - - - - ib.
- Though the devise in the above cases had been to the sons or daughters as tenants in common - - - - ib.
- May be void as to part, as doing only that which the law would have effected without the devise, and good for the residue - - - ib.
- May fail of effect by express or implied waiver by the devisee - - - - ib.

Whenever a person, having a claim on the devisor's estate independent of him, and also a claim under his will, which claims are repugnant, and pursues the former, the latter is waved - - - - - v. 192, 196

This rule extends not to cases where he takes upon himself to devise lands in which he has no interest - - - - - v. 213

May fail of effect, by the devisor's performing it in his life-time - - - - - v. 201

So by falling within the purview of the stat. 3 and 4 Will. and Mary, c. 14, against fraudulent devises to cheat creditors - - - v. 201, 203

Exception where there is a limitation or appointment in the devise for payment of debts - - - v. 203, 204

Revoked by a man's marriage and having issue - - - v. 213, 214

But marriage, &c. being only a presumptive revocation, it may be rebutted by circumstances - - - v. 214

Or by any kind of evidence, parol or written - - - ib.

Quære, whether marriage, &c. be a revocation of a devise, not disposing of all the testator's estate - - - - - ib.

Will of a woman not revoked, but suspended by her marrying - - - - - v. 213

Will not revoked by an alteration in the personal capacity of the devisor; as his becoming *non compos* after making the will, or the like - - - ib.

Revoked by an alienation and taking back of the fee in the land, &c. devised - - - v. 214

Or making a conveyance to the devisor's own use - - - v. 215

Or to other uses, with remainder to his own right heirs, which is the old reversion - - - v. 216

And the same rule applies to equitable estates, v. 218

Devise, where the thing lies in grant, revoked by a subsequent grant, if the fee be affected - - - v. 220, 221

Although these conveyances be made for a particular purpose - - - - - v. 221, 222

- Or be made to give effect to a devise made previously - - - - - v. 222, 223
- Or done or suffered through mistake v. 223, 224
- Or be the very act which the testator intends to be done, and directs in his will - - - v. 224
- Of a lease, will be revoked by a surrender and renewal made subsequent - - - v. 224, 225
- Not revoked by a stranger's cancelling or tearing it - - - - - v. 243
- May be good as to part, although other parts obliterated by the testator subsequent to its execution - - - - - v. 257, 258
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- Women seised of jointures or intails in right of their husbands, prohibited by 11 Hen. 7, and and 32 Hen. 8, from levying fines thereof - - ib.
- So husbands seised in right of their wives - - - - ib.
- So felons, if before conviction, and the deed of uses be prior to the offence - - - - iv. 436
- Joint-tenants, tenants in common, and coparceners, may levy fines of their respective parts - - - - iv. 440

- A stranger, if he acquire the freehold by disseisin, &c. may levy a fine; and if no claim be made within five years after proclamation, the owner will be bound - - - iv. 473
- To whom a fine may be levied* - - - iv. 440
- Cannot, generally, be levied to any who are not parties to the writ of covenant - - - iv. 441
- Exceptions in cases of vouches and demandants ib.
- So in the case of renders to persons in remainder ib.
- May be levied to femes covert, minors, idiots, lunatics, or persons beyond sea, attainted out-laws, bastards, clerks, convicts, aliens, &c. iv. 440
- When levied to feme covert or infant, they need not be examined as when levied by them - ib.
- Fines may be levied to corporations, by leave of the justices - - - - - ib.
- Of what things a fine may be levied* - - - iv. 441
- Of all things of which a *præcipe quod reddat* will lie - - - - - ib.
- Of an honour, manor, barony, river, corody, office, fishery, warren, fair, rectory, advowson, rent, common, way, ferry, franchise, reversion, toll, service, oblation, spiritual property in lay hands, &c. &c. - - - - - ib.
- So of estovers - - - - - iv. 445
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- Of a rent-charge, or other rent, *de novo* - iv. 443
- But not of an annuity, though granted to a man and his heirs - - - - - ib.
- May be levied of a trust, as well as of a legal estate - - - - - iv. 438, 443, 473
- Cannot be levied of copyhold lands by the copyholder - - - - - iv. 473
- Nor of lands holden in ancient demesne - - - iv.
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- The same description now sufficient, as in deeds of conveyances - - - - iv. 443
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- Exceptions as to the courts of the county palatine of Lancaster, Durham, courts of Chester, great sessions in Wales, Ely, courts of ancient demesne, and of cities and corporate towns by special custom - - - - ib.
- But in these courts, unless by special custom, the fine, though with proclamations, will not bar an intail, but only have the effect of a fine at common law - - - - iv. 464
- Before whom a fine may be levied* - - iv. 447
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- Before two justices, or one justice and a knight, under *dedimus potestatem* at the party's residence - - - - iv. 448
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- Fine at common law, *i. e.* without proclamations, bars only parties and privies to the concord, *i. e.* those who must claim through the conusor, iv. 453
- But if levied by tenant in tail, works a discontinuance, and puts the issue or remainder-men to their *formedon* - - - - ib.
- A fine levied with proclamations, under 4 Hen. 7, c. 24, bars not only all rights and interests of parties and privies, but of strangers, unless they claim within five years after the last proclamation, or other time of their right subsequently accruing - - - - iv. 454, 455
- Unless under legal disability, and then within a like period after disability removed - - ib.

- Such fine declared by 32 Hen. 8. c. 36, to bar intails limited to persons levying the same, iv. 456
- But this act does not extend to copyholds - iv. 470
- But must be levied in C. B. - - - iv. 464
- The proper fine for barring an estate tail, is a fine *come ceo*; but other fines will bar the issue in tail so long as the estate which passes continues - - - iv. 465
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- Fine levied by husband alone of land of which he is tenant in special tail with his wife, binds his issue - - - iv. 457
- Bar^o issue and lineal heirs, though the intail be in remainder or reversion; so if but a mere right or possibility of intail; but not collateral heirs - - - iv. 459
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- Tenant for, disabled by 32 Hen. 8, c. 31, and 14 Eliz. c. 8, from suffering a recovery without the assent of reversioners, &c. - - - - - iv. 521
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- So, to a man and "his heir," or to him "or his heirs," or to two persons "and heirs" - - - - - ib.
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- In such limitation the heirs take by purchase only, where no preceding estate of freehold in the ancestor - - - - - ii. 48
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To *B.* to hold to *B.* and *C.* and their heirs, *C.* takes nothing - - - - - iii. 418

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- To two men or two women and the heirs of their bodies, they are joint-tenants for life, with several inheritances to their issue in common, iii. 420, 449
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- To two persons and the survivor of them is an estate for life in joint-tenancy, with contingent remainder in fee to the survivor - iii. 438, n. (2)
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- Of freeholds to two "to be equally divided"—a joint-tenancy in a deed - - - - - iii. 422
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- To two purchasers, where each advances an equal share of purchase-money, gives a joint-tenancy both in law and equity - - - - - ii. 423
- But a tenancy in common in equity, whether money advanced by each was unequal, or one has expended money upon the premises - ib.
- So if they take as mortgagees they are tenants in common, and not joint-tenants - - - - - iii. 432
- To one man and two women, or to two men and one woman, and the heirs of their two or three bodies begotten, gives a joint estate for life with several inheritances - - - - - iii. 451, 452
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- But if divorced *a vinculo matrimonii*, their estate is only for life - - - - - iii. 453
- To a man and woman unmarried, and the heirs of their bodies, gives them an estate in special tail - - - - - ib.
- To two men and the survivor, and their heirs, equally between them—they are joint tenants for life with several inheritances - - - - - ib.
- To two persons and the survivor of them, and the heirs of the survivor, joint-tenants for life—a contingent remainder in fee to the survivor
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- But devise to three as joint-tenants and the survivors and survivor, and the heirs of the survivor, a joint-tenancy in fee - - - - - ib.
- To two persons, remainder to the heirs of their bodies, remainder to them and their heirs, they will be joint-tenants for life, tenants in common tail, and joint-tenants in fee of the reversion - - - - - iii. 460
- To the use of the poor of the parish of *D.* is good - - - - - iii. 522
- By appointment to the issue of a person unborn at the creation of the power, bad - - - - - iv. 368
- But to a person for life not then *in esse*, good - - - - - ib.
- In trust to permit all and every the children of the marriage to take the rents and profits to them and their heirs for ever, the children take an estate of joint-tenancy - - - - - iv. 193
- To a man and “his heirs on the part of the mother,” is void; the heirs on the part of the father shall succeed - - - - - iv. 331
- To one for “life, remainder to his next heir male,” the heir takes by purchase - - - - - ib.
- Recovery, by 14 Geo. 2, c. 20, good, after twenty years, though irregularly suffered - - - - - iv. 537
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- Or though no record of the recovery be found, if deed to make tenant to *præcipe* and to declare the uses of the recovery appear - - - - - iv. 547

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- Limitation, which would give an estate-tail in freeholds, will give an absolute interest in personality - - - - - ib.
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- Limitation by deed to husband and wife, and the heirs *on* the body of the wife by the husband begotten—estate-tail in both husband and wife, iii. 423
- But if to the heirs *of* the body of wife by the husband—tail in wife only - - - - - ib.
- To *A.* for life, remainder to heirs of the body of the same person alone, is an estate tail; but otherwise if the remainder be to the heirs of the body of *A.* and another - - - - - iii. 424
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